77-470
No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION NO. 391, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

v.

PILOT FREIGHT CARRIERS, INC.,

AND

NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DAVID PREVIANT, Esquire
ROBERT M. BAPTISTE, Esquire
25 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 624-6945

ANGELO V. ARCADIPANE, Esquire
WILLIAM W. OSBORNE, JR., Esquire
1819 H Street, N.W.
Washington, D.C. 20006
(202) 785-3525

Attorneys for Petitioner

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D.C. 20001

INDEX

CITATIONS

Cases: Page

CITATIONS—Continued

Page

Statute:

CITATIONS—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. ——

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION NO. 391, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

v.

PILOT FREIGHT CARRIERS, INC.,

AND

NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Chauffeurs, Teamsters and Helpers Local Union No. 391, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("the Union"), respectfully requests that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on June 29, 1977.

OPINIONS BELOW

The opinion of the court of appeals is not yet officially reported but can be found at 95 LRRM 2900 (App. A, *infra*, pp. 1a-18a). The Decision and Order of the National Labor Relations Board ("the Board") was issued on December 5, 1975 and is reported at 221 NLRB 1026 (App. B, *infra*, pp. 20a-92a).

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1977 (App. A, *infra*, p. 19a); its jurisdiction was invoked pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. Sec. 151, *et seq.*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the court, in rejecting the Board's conclusion that the Company's dispatchers are "employees", applied an erroneous standard of judicial review.

2. Whether the court, whatever standard of review is applied, substituted an erroneous construction of Section 2(11) of the Act for a correct, long established construction of that Section by the Board.

STATUTE INVOLVED

The provisions of the National Labor Relations Act involved in this case are reproduced in Appendix C, *infra*, pp. 93a-95a.

STATEMENT

A. Pertinent Facts

Pilot Freight Carriers, Inc. ("the Company") is a certificated common carrier, with its main terminal at Ker-

nersville, North Carolina. In August 1973 the Union obtained recognition as the exclusive bargaining representative of the Company's Kernersville office and clerical personnel, a unit which included local, line-haul, and central dispatchers. Within a week thereafter, the Company lodged a unit clarification petition with the Board which sought a determination of whether all of its dispatchers were "employees", and thus properly included in the represented unit, or "supervisors". In the midst of that proceeding, however, the Company began a campaign of coercion against its dispatchers which included threats, interrogations, and other conduct designed "to influence the result" of the unit clarification case (App. B, *infra*, p. 28a). Upon the filing of an unfair labor practice charge by the Union, the Board discontinued the unit clarification case and instituted an unfair labor practice proceeding which culminated in a conclusion by it that the Company violated Sections 8(a)(1), (3) and (5) of the Act. The court of appeals has refused to enforce the Board's Order in any respect.[1]

The critical issue before the Board and court was whether the Company's dispatchers are "employees" within the meaning of the Act, or "supervisors" of the Company's drivers and thus excluded from the Act's coverage. A careful comparison of the decisions of the Board and the court reveals no significant disagreement between them concerning what these dispatchers actually do and do not do, although there are of course considerable differences over the proper characterization of these "hard facts" and the ultimate conclusions to be drawn from them.[2] The pertinent facts can be summarized as follows.

---

[1] The Union was the charging party before the Board and an intervenor before the court of appeals. In both forums the Company was the respondent.

[2] The Board's Administrative Law Judge determined that "[t]here are no significant credibility conflicts in this record . . . there are

The Company employs three types of dispatchers at its Kernersville terminal: local, line-haul and central dispatchers. Local dispatchers deal with the pickup and delivery of freight within a 50-mile radius of Kernersville; line-haul dispatchers are responsible for checking in and out of the Kernersville terminal, drivers transporting freight originating from or destined for points beyond this radius. The Company's central dispatchers are concerned with the efficient movement of freight and equipment throughout its system.

1. *Local Dispatchers.* The job of local dispatchers essentially entails the initial assignment of drivers to various runs and, thereafter, the relay of additional pick-up instructions to them in response to requests from customers and salesmen received throughout the day. The initial assignment of a particular driver to a particular run is governed by detailed provisions in the collective bargaining agreement between the Company and the Union covering drivers. "It is basically the same thing every day. . ." (App. A, *infra*, p. 7a).

Local drivers are dispatched to pickups throughout the day according to their proximity to the pickup point, and the type of equipment and space required to accommodate the load.

2. *Line-Haul Dispatchers.* The line-haul dispatchers' duties primarily involve selecting a tractor for a loaded trailer, weighing the trailer, checking the driver's trip card prepared by the dispatch clerk, and punching road drivers in and out.[3]

---

no significant points in the record at which a witness for one side testified that a hard fact—as distinguished from a conclusion—testified to by a witness for the other side was not so." (App. B, *infra*, p. 45a). "Thus", as the Board stated, "the real problem was one of drawing conclusions from lengthy testimony". (*Id.* at 22a).

[3] The line-haul dispatchers and the dispatch clerks work as a team; no task is performed by one which is not likewise performed by the other. It is undisputed that dispatch clerks are "employees" within the meaning of the Act, and not "supervisors".

Drivers are dispatched to runs, regardless of distance, on a first-in, first-out system established by their Union contract. The job of calling in drivers for trips is the principal duty of the dispatch clerks. On occasion the first-in, first-out procedure is varied in order to expeditiously move freight and equipment (App. A, *infra*, p. 12a; App. B, *infra*, pp. 24a-25a). Similarly on occasion a driver may arrive unreasonably late or in an apparent state of intoxication. In these instances, the dispatchers' only permitted recourse is to refer him to a Driver Supervisor, at least one of whom is always on duty at Kernersville.

3. *Central Dispatchers.* All but a small fraction of the central dispatchers' time is devoted to two functions. The first and major one is to maintain a constant accounting of the location and destination of every piece of equipment in the Company's system.[4] Central dispatchers also assign departure times to loads leaving Kernersville and serve as line-haul dispatchers for other terminals when they are closed. Finally, a small fraction of the central dispatchers' time is devoted to answering calls from road drivers concerning various matters. Some calls are referred to the Driver Supervisor. In responding to others, the central dispatchers' overriding concern is the efficient movement of freight for, with but few exceptions, these dispatchers do not personally know the drivers. Drivers merely identify themselves to the dispatchers by trailer number, not by name.

4. *Driver Supervisors.* As already noted, the Company had on duty at all times at the Kernersville terminal officials designated as Driver Supervisors. All parties, the Board, and the court uniformly acknowledge that

---

[4] At the time of the hearing, the Company maintained 41 terminals throughout the East Coast and extending west to Cleveland.

the Driver Supervisors are, in the full statutory sense, the first line supervisors of over-the-road drivers (App. A, *infra*, pp. 14a, 16a; App. B, *infra*, p. 22a). They possess and exercise authority to evaluate the performance of road drivers; to reprimand and otherwise discipline them; to relieve a driver from duty; to handle grievances; and to effectively recommend discharges. Overseeing the work of road drivers is their sole job.

Dispatchers do not hire drivers; have no authority to reprimand, discharge or take other job action against them; nor do they evaluate their performance.

B. The Decisions of the Board and the Court

A unanimous panel of the Board decided that the Company's workers in all three dispatcher classifications are "employees" entitled to the Act's protection. In the Board's judgment, the Company's Driver Supervisors, and not its central and line-haul dispatchers, are responsible for the "actual supervision of over-the-road drivers"; and the Company's Terminal Manager, not its local dispatchers, "has authority to hire, discharge, and discipline local drivers and to direct them to the extent not covered by company procedures." (App. B, *infra*, pp. 22a, 26a). The Board also found that the duties of the Company's dispatchers are circumscribed by written Company directives, federal regulations, and the drivers' collective bargaining agreements so as to eliminate the exercise of independent discretion by dispatchers and thoroughly routinize their duties (App. B, *infra*, pp. 22a-23a, 25a-26a). Most significantly, it was concluded that while certain activities of the dispatchers may have an impact on a driver's working conditions and pay, the impact is not by design but merely incidental to the dispatchers' paramount concern for the movement of equipment, and consequently "not in itself indicative of the exercise of supervision within the meaning of the Act". (App. B, *infra*, p. 23a).

The court rejected the Board's conclusions in their entirety for the stated reason that they were not supported by substantial evidence and found that each of the Company's dispatchers is a statutory supervisor. In making this judgment, however, the court relied largely upon the same "hard facts" which the Board had considered not decisive. Regarding local dispatchers, the court observed that they are able to alter the contractually specified dispatching procedure when "necessary to move freight" (App. A, *infra*, p. 7a); that dispatching pick-ups "could determine whether and how much overtime was allocated to that driver" (*Id.* at p. 8a); and that dispatchers could select casual casual drivers for dispatch "according to availability and location" (*Id.* at p. 7a). It then reversed the Board's judgment that these facts do not constitute the "responsible direction" of employees because, as the court states, "[t]here is a substantial possibility that the fraternal feelings engendered by union membership would threaten the ability of a local dispatcher with such responsibilities to exercise his authority in his company's best interest" (App. A, *infra*, p. 10a). Line-haul dispatchers refer inebriated and unreasonably late drivers to the Driver Supervisor and are in a position where they may vary contractual dispatching procedures "if necessary to meet the company's obligation to deliver freight on time" (*Id.* at p. 15a). Because "[u]ndivided loyalty from its line-dispatchers in the exercise of their discretion was essential to the company", they too are supervisors according to the court (*Id.* at p. 15a). Finally, since central dispatchers may allow drivers to vary their assignments, "[i]t is clear that there was a substantial possibility that a fraternal union relationship between central dispatchers and drivers could have impaired the dispatchers' ability to make their decisions in the company's best interest" (*Id.* at p. 17a). For this reason, the court concluded they are also "supervisors".

In summary, the Board concluded that the dispatchers do not responsibly direct employees because their real concern is the movement of equipment and freight, and the court disagreed.

REASONS FOR GRANTING THE WRIT

1. The court of appeals applied an erroneous standard of review in rejecting the Board's determination that the Company's dispatchers are "employees" and not "supervisors" within the meaning of Sections 2(3) and 2(11) of the Act, respectively. Specifically, the court substituted its judgment for the Board's expertise regarding the dispatchers' status under the Act thus exceeding the bounds of its reviewing authority. Reaffirmation by this Court of the deference which an appellate court must afford an application by the Board of the statutory definition in Section 2(11) to particular facts is essential to the sound administration of the Act and of significance to administrative procedure generally.

This Court has restricted the scope of judicial review where an administrative agency, such as the Board, makes a mixed determination of law and fact within the field of its specialized expertise, since that type of determination carries with it "the authority of expertness which courts do not possess and therefore must respect". *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488 (1951). Thus, an appellate court must accept an agency's "expert" determination if it has "'warrant in the record' and a reasonable basis in law". *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944). Proper application of the *Hearst* standard requires that the reviewing court limit its inquiry to whether there is "'a rational basis for the conclusions approved by the administrative body'." *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 146 (1939) (citations omitted), as

cited in *NLRB* v. *Hearst Publications, Inc.*, *supra*, 322 U.S. at 131.[5]

The *Hearst* standard of review has become recognized as a fundamental principle of administrative law (See e.g., 4 DAVIS, ADMINISTRATIVE LAW TREATISE, § 30.05 at 213-221 (1958 ed.); Jaffe, *Judicial Review: Question of Law*, 69 Harv. L. Rev. 239, 251-257, 263-264 (1955)) particularly applicable to determinations by the Board involving an evaluation of the significance of facts in terms of specialized statutory definitions. *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166 (1971).

After its examination of the lengthy record in this case, the Board concluded that the various Company dispatchers are statutory "employees" rather than "supervisors" within the meaning of Section 2(11) and therefore entitled to the Act's protection. Despite the great volume of evidence presented to the Administrative Law Judge, there was no conflict in the record regarding the "hard facts".[6] The Board's determination that the Company's dispatchers are "employees" was therefore not a finding of fact but rather a conclusion based upon essentially undisputed facts. Such a conclusion with respect to the application of Section 2(11) was an exercise of the Board's peculiar expertise as the agency uniquely able to consider "the policy and purpose of the Act, the circumstances and background of particular employment

---

[5] The narrow *Hearst* standard of review is only applicable where, as here, the administrative determination is within an area of the agency's specialized expertise. When an agency's determination is not within its special expertise, but rather within a field in which the reviewing court has equal competence, the court has a significantly greater scope of review. See *NLRB* v. *United Insurance Co.*, 390 U.S. 254, 260 (1968).

[6] See n. 2, *supra*, pp. 2-3, and accompanying text.

relations, and all the hard facts of industrial life". *NLRB* v. *E.C. Atkins & Co.*, 331 U.S. 398, 403 (1947).[7]

The Board's considered judgment on the issue of the dispatchers' status under the Act was, accordingly, due substantial deference from the court of appeals as required by this Court's *Hearst* standard.[8] Instead, the court of appeals ignored the Board's expertness and treated its conclusions that the dispatchers were "employees" rather than "supervisors" as no more than an administrative finding of fact, reviewable under the standard announced in *Universal Camera Corp.* v. *NLRB*, *supra* (App. A, *infra*, pp. 4a, 9a, 10a, 12a, 17a). The

[7] When Congress enacted the statutory exclusion of supervisors from the Act in 1947, it adopted as the definition of "supervisor" in Section 2(11) the test which the Board had previously employed to ascertain the status of "foremen" in unit determination proceedings. S. Rep. No. 105, S.1126, 80th Cong., 1st Sess. 4 (1947), cited in *Parma Water Lifter Co.*, 102 NLRB 198, 202 (1953), enf'd, 211 F.2d 258 (9th Cir. 1954); *Gulf Bottlers, Inc.*, 127 NLRB 850, 860, fn. 6 (1960), enf'd, 298 F.2d 297 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 843 (1962). Congress thus relied upon the Board's expertise not only for the interpretation and application of Section 2(11) but for the very content of that Section of the Act. By contrast, at the same time it enacted Section 2(11), Congress removed the issue of whether workers should be excluded from the Act as "independent contractors" from the Board's administrative expertise by specifying that common law principles of agency should govern. See *NLRB* v. *United Insurance Co., supra*, 390 U.S. at 260. Prior to Congress' adoption of the common law agency test for "independent contractors" this Court had prescribed judicial deference on that issue to the Board's expertise. See *NLRB* v. *Hearst Publications, Inc., supra.*

[8] The issue of the supervisory status of the Company's dispatchers was originally to be determined in a unit clarification proceeding. The Company aborted that proceeding by its commission of serious unfair labor practices. This Court has accorded the Board broad discretion in its unit determinations. *NLRB* v. *Hearst Publications Inc., supra*, 322 U.S. at 132-135; *Pittsburgh Glass Co.* v. *NLRB*, 313 U.S. 146 (1941). The Board should have no less discretion in determining the supervisory status of the Company's dispatchers in the context of an unfair labor practice case. See *NLRB* v. *E. C. Atkins & Co., supra.* See also *Corrie Corp.* v. *NLRB*, 375 F.2d 149, 155 (4th Cir. 1967).

court thus disregarded the applicable decisions of this Court which have carefully differentiated between the appellate review of administrative findings of fact, and review of the application by the Board of broad statutory terms, within the agency's field of expertise, to particular facts. *NLRB* v. *Hearst Publications Inc., supra*, 322 U.S. at 130-131; *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co., supra*, 404 U.S. at 166; *NLRB* v. *United Insurance Co., supra*, 390 U.S. at 260; *Universal Camera Corp.* v. *NLRB, supra*, 340 U.S. at 486, fn. 22. See *NLRB* v. *Bell Aerospace, Division of Textron, Inc.*, 416 U.S. 267, 311 (1974) (Dissenting opinion of Justice White). Its adoption of an erroneous standard of review, far from a mere error of semantics, permitted the court to ignore the Board's informed judgment and evaluate, *de novo*, the significance of essentially undisputed record evidence in terms of Section 2(11).

Significantly, the misapprehension of the court of appeals concerning the proper scope of its review in cases such as this one is not unique, but is characteristic of existing judicial confusion on this question. While some decisions reflect proper recognition of the narrow *Hearst* standard (See e.g., *NLRB* v. *Broyhill Co.*, 514 F.2d 655, 658 (9th Cir. 1975); *NLRB* v. *Doctors' Hospital of Modesto, Inc.*, 489 F.2d 772, 776 (9th Cir. 1973); *Wichita Eagle & Beacon Publishing Co., Inc.* v. *NLRB*, 480 F.2d 52, 54-55 (10th Cir. 1973), *cert. denied*, 416 U.S. 982 (1974); *Jas. H. Matthews & Co.* v. *NLRB*, 354 F.2d 432, 435 (8th Cir. 1966), *cert. denied*, 384 U.S. 1002 (1966)), others, as in the present case, reflect an erroneous application of the "substantial evidence" standard of review. See e.g., *Wisconsin River Valley District Council of Carpenters* v. *NLRB*, 532 F.2d 47, 50 (7th Cir. 1967); *NLRB* v. *Gray Line Tours, Inc.*, 461 F.2d 763, 764 (9th Cir. 1972); *Eastern Greyhound Lines* v. *NLRB*, 337 F.2d 84 (6th Cir. 1964); *NLRB* v. *Florida Agricultural Supply Co.*, 328 F.2d 989, 991 (5th Cir.

1964). In a third category of decisions, proper deference is accorded the Board's expertise, although the *Hearst* standard is not expressly recited. See e.g., *NLRB* v. *Detroit Edison Co.*, 537 F.2d 239, 242 (6th Cir. 1976); *GAF Corp.* v. *NLRB*, 524 F.2d 492, 494-495 (5th Cir. 1975); *NLRB* v. *Swift & Co.*, 292 F.2d 561, 563 (1st Cir. 1961). Needless to say, it is essential to the administration of the Act that there be no confusion among the circuit courts regarding such an important question.

The decision below is thus in conflict with decisions of this Court, and illustrative of a not uncommon misapprehension among courts generally which should be corrected.

2. Whatever standard of review is applicable, the court of appeals repudiated a long established construction of Section 2(11) by the Board and applied, in its stead, an erroneous one. This aspect of the court's decision is of substantive significance to the administration of the Act and to the broad class of workers necessarily deprived of the Act's protection by the court's errant construction of this Section.

Since shortly after the enactment of Section 2(11) in 1947, the Board has consistently held that workers, whose primary function relates to the movement of equipment or materials with only an indirect and incidental effect upon the employment conditions of fellow workers, were not intended by Congress to be excluded as "supervisors" from the Act's coverage. *Gate City Transit Lines*, 81 NLRB 79 (1949); *New England Transportation Co.*, 90 NLRB 539, 540 (1950); *Baltimore Transit Co.*, 92 NLRB 688, 692 (1950); *Baltimore Transit Co.*, 92 NLRB 1260, 1264 (1951); *Street Railway Co.*, 93 NLRB 782 (1951); *Capital Transit Co.*, 98 NLRB 141, 143 (1952); *Cincinnati Transit Co.*, 121 NLRB 765, 767 (1958); *Eastern Greyhound Lines*, 138 NLRB 8, 13-14 (1962); *Greyhound Airport Services*,

Inc., 189 NLRB 291, 293 (1971); *Harmon Industries, Inc.*, 226 NLRB No. 75 (1976). In the Board's judgment, the direction and control of equipment, as contrasted to personnel, does not constitute the use of "independent judgment" in the "responsible direction" of employees sufficient to bring an individual within the statutory definition of "supervisor". *Baltimore Transit Co., supra*, 92 NLRB at 692.

Here, the Board concluded that the Company's central dispatchers "are like the radio dispatchers in *The Baltimore Transit Company and the Baltimore Coach Company*, 92 NLRB 1260 (1951), merely exerting direction and control over the movement of equipment, and the direction of personnel by them occurs only as an incidental result, hence they are not supervisors within the meaning of Section 2(11) of the Act." (Citation omitted). (App. B, *infra*, pp. 23a-24a). The Board similarly concluded that the line-haul dispatchers are not "supervisors" since "[i]n performing [their] duties the line-haul dispatcher[s'] overriding interest and concern—like that of the central dispatcher in his work—is the movement of equipment in the fastest, most economical way possible. The incidental impact this may have on drivers is not in our opinion the exercise of supervision within the meaning of the Act." (*Id.* at 25a). With respect to its conclusion that the Company's local dispatchers were "employees" entitled to the Act's protections, the Board observed that the local dispatchers' decisions which impacted upon driver employees were "essentially dictated by economic considerations, for which the Employer has provided comprehensive dispatching procedures." (*Id.* at p. 26a).

Because the court's opposite conclusions are based upon factors which the Board either explicitly or implicitly found not determinative, its decision operates as an effective reversal of the *Baltimore Transit* doctrine. More-

over, the duties of the Company's dispatchers which the court viewed as indicative of supervisory status are duties typical of most dispatchers in the trucking industry and, indeed, the transportation industry as a whole.[9] Accordingly, at the very least, the rights under the Act of some 18,000 truck dispatchers in this country[10] will be impaired if the court's decision is permitted to stand.

Compounding its erroneous reversal of the Board's *Baltimore Transit* doctrine, the court fashioned a new test for construing Section 2(11) which is plainly inconsistent with Congress' intent, and which would deprive an even broader class of workers of their rights under the Act. Under the court's construction of Section 2(11), workers are "supervisors" whenever, in the court's view, there exists "a substantial *possibility* that fraternal feelings arising from [their] unionization . . . [will] interfere with the proper exercise of [their] power" (App. A, *infra*, p. 4a, emphasis added. See also App. A, *infra*, pp. 10a, 15a, 17a).

---

[9] The court relied primarily upon three factors in support of its rejection of the Board's determination that the dispatchers are "employees": that the dispatchers refused to permit intoxicated drivers to make a run (App. A, *infra*, pp. 14a-15a); that the dispatchers had authority to vary routes, permit time-off "and cause drivers to incur" overtime (Id. at 10a, 15a, 17a); and that the dispatchers had authority to make route assignments. The Board, in a number of cases not cited by the court, has rejected each of these factors as indicative of supervisory status where, as here, they are incidental to the movement of freight or equipment. See e.g., *Spector Freight Systems*, 216 NLRB 551, 551-554 (1975); *Greyhound Airport Services, supra*, 189 NLRB at 293-294; *Carey Transportation, Inc.*, 119 NLRB 332, 333-334 (1957); *Yellow Cab, Inc.*, 131 NLRB 239, 240-241 (1961); *Capital Transit Co., supra*, 98 NLRB at 144 (1952).

[10] The Bureau of Labor Standards advises that 18,256 individuals were employed as dispatchers in the trucking industry alone in 1974, based upon projected seasonally adjusted 1970 census data. This figure does not include dispatchers in other segments of the transportation industry such as taxi cab, bus and airline dispatchers.

Not only is the source of this new test obscure, but the test itself is contrary to Congress' intended construction of Section 2(11). Congress concededly enacted Section 2(11) to prevent the interference with management prerogatives which might result from the unionization of supervisors. The test adopted by the court, however, substitutes the reason for Congress' exclusion of supervisors for the definition which Congress formulated for ascertaining that status. The court's test necessarily excludes all middle level classifications of workers such as "leadmen", "set-up men" and "straw bosses" from the Act's coverage, contrary to Congress' explicit intentions. S. Rep. No. 105, S. 1126, 80th Cong., 1st Sess. 4 (1947). Indeed, such a test logically extended deprives innumerable rank-and-file workers of statutory protection since, in almost any instance, an employer can contend that there is "a substantial *possibility* that fraternal feelings arising from [their] unionization [will] interfere with the proper exercise of [their] power" (App. A, *infra*, p. 4a).

CONCLUSION

The issue of the proper standard of review to be applied to the Board's construction of Section 2(11) of the Act is of overriding importance to the administration of the Act, as is the issue of the status of dispatchers. For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID PREVIANT, Esquire
ROBERT M. BAPTISTE, Esquire
25 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 624-6945

ANGELO V. ARCADIPANE, Esquire
WILLIAM W. OSBORNE, JR., Esquire
1819 H Street, N.W.
Washington, D.C. 20006
(202) 785-3525

Attorneys for Petitioner

Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 76-1089

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

and

CHAUFFEURS, TEAMSTERS and HELPERS LOCAL UNION No. 391,
Intervener,

versus

PILOT FREIGHT CARRIERS, INC.,
Respondent.

Application for Enforcement of an Order of the National Labor Relations Board

---

Argued September 15, 1976 Decided June 29, 1977

Before HAYNSWORTH, Chief Judge, WINTER and BUTZNER, Circuit Judges

---

Andrew F. Tranovich, Attorney, National Labor Relations Board (John S. Irving, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Carl L. Taylor, Associate General Counsel, Elliott Moore, Deputy As-

sociate General Counsel, Paul J. Spielberg, Attorney, National Labor Relations Board on brief) for Petitioner; Robert M. Baptiste (Gary S. Whitlen and Angelo V. Arcadipane on brief) for Intervenor; John O. Pollard (Blakeney, Alexander & Machen on brief) for Respondent.

HAYNSWORTH, Chief Judge:

This is a petition for enforcement of the National Labor Relations Board's order against Pilot Freight Carriers, Inc. The Board found that Pilot's dispatchers at its Kernersville, N. C. terminal were "employees" and not "supervisors" within the meaning of §§ 2(3) and 2(4) of the National Labor Relations Act, 29 U.S.C.A. §§ 152(3), 152 (11) (1973)[1] and that Pilot had violated Section 8(a) (1), (3) and (5) of the Act, 29 U.S.C. §§ 158(a) (1), (3) and (5), (1973) by coercively interrogating its employees, by issuing job descriptions, and instituting a supervisory training program intended to deprive its dispatchers of their "employee" status and by failing to consult the Union before issuing the job descriptions and instituting the training program. In response to the Board's petition Pilot contends that it was free to question the dispatchers, issue the job descriptions, and institute the training program because the dispatchers were "supervisors" and thus not protected by § 8(a) (1) and (5).

---

[1] Section 2(3) excludes "any individual employed as a supervisor" from the definition of "employee".

Section 2(11) defines "supervisor" as follows:

"The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

I.

We need not evaluate every function performed by each type of dispatcher in order to determine whether the Board's determination that they were not supervisors within the meaning of § 2(11) is supported by substantial evidence. It is well settled that "§ 2(11) is to be read in the disjunctive with the existence of any one of the statutory powers, regardless of the frequency of its exercise, being sufficient to confer supervisory status upon the employee." *Pacific Intermountain Express Co.* v. *NLRB*, 412 F. 2d 1, 3 (10th Cir. 1969); *accord NLRB* v. *Metropolitan Petroleum Co.*, 506 F. 2d 616, (1st Cir. 1974) as long as the existence of the power is real rather than theoretical. *NLRB* v. *Southern Bleachery and Print Works*, 257 F. 2d 235, 239 (4th Cir. 1958). But the statute also makes it clear that the exercise of those powers must require the use of independent judgment and not be merely routine or clerical. A mere lead man or a straw boss is not a "supervisor" under the Act. *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 279, 283 (1974).

As the Board points out, the legislative history of § 2(11) clarifies the meaning of the independent judgment requirement. Section 2(11) was added by the Taft-Hartley Act. In enacting that section, Congress was concerned about the effect of unrestricted unionization of first-line supervisors. Congress believed that fraternal union feelings would tend to impair a supervisor's ability to apply his employer's policy to subordinates according to the employer's best interests. *See NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974); *Beasley* v. *Food Fair of North Carolina*, 416 U.S. 653, 660 (1974). It withdrew certain protections from "supervisory" employees in order to give employers more freedom to prevent a pro-union bias from interfering with the independent judgment of employees holding supervisory positions.

Pilot's dispatchers must be classified as supervisors if they actually possessed at least one of the "supervisory" powers listed in § 2(11) and the exercise of that power required "independent judgment." They possessed "independent judgment" if there was a substantial possibility that fraternal feelings arising from the unionization of the dispatchers would interfere with the proper exercise of the dispatchers' power.

The evidence in this case was presented to an administrative law judge. The hearing lasted thirteen days and produced a two-thousand page transcript. After hearing the testimony and receiving documentary evidence, the administrative law judge found that Pilot's dispatchers were supervisors and that Pilot had not violated the Act by questioning them, instituting the supervisory training program, and issuing job descriptions outlining their supervisory authority. But the Board rejected the administrative law judge's determination. It found that Pilot's dispatchers were employees rather than supervisors.

We must accept the Board's finding if it is supported by substantial evidence on the whole record, *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488 (1951) even if we might have resolved the question differently. *Bayside Enterprises* v. *NLRB*, 45 USLW 4086, (January 11, 1977). Deference to the Board's finding is especially appropriate here because the case involves

> but one specific instance of the "[m]yriad forms of service relationship, with infinite and subtle variations in the terms of employment, [which] blanket the nation's economy," and which the Board must confront on a daily basis.

Id. at 4087.

But neither the General Counsel nor the Board have directed us to substantial evidence supporting the Board's

decision. We have examined the lengthy transcript as well as the material submitted in the joint appendix and find no substantial evidence to rebut the testimony that indicates that the dispatchers involved here possessed supervisory authority requiring the use of independent judgment as defined by § 2(11).

II.

Pilot is an interstate trucking company with terminals throughout the eastern seaboard. The central terminal is in Kernersville, North Carolina. During the period involved here[2] there were three types of dispatchers at the Kernersville terminal: local dispatchers, line-haul dispatchers, and central dispatchers.

(a) Local dispatch was separate from the integrated central and line-haul dispatch operations. Pilot employed two local dispatchers who directed the movement of freight delivered or picked up within a fifty-mile radius of Kernersville. They worked five days a week between 6 a.m. and 7 or 8 p.m. Pilot's terminal manager supervised the local dispatchers.

When a load was ready for local delivery, the local dispatcher assigned the load to a local driver, printed the departure time on the driver's trip card, and gave the driver the trip card and other documents before sending him on his way. During the day the local dispatchers received requests from customers and salesmen to pick up freight within the local area. They recorded each request and instructed drivers by telephone or radio to make the pickup. When the drivers completed their

---

[2] The dispute here involves the nature of the dispatchers' duties during the period from August 1973 through February 1974 for that is when the acts giving rise to this dispute occurred. Thus, we will discuss the dispatchers' duties as they were at that time and not as they were at the time of the hearing on the charges.

work and returned to the terminal, the local dispatchers received various documents from the drivers.

The forty-eight local drivers were paid by the hour. A union contract governed the assignment of the drivers to loads ready for delivery. The "regular bid" drivers were the most senior drivers. They bid by seniority for priority in the right to carry loads destined for certain areas. "Wild bid" drivers bid for priority in the right to carry loads departing at certain hours. The "wild bid" drivers could replace "regular bid" drivers who were unavailable, or they could serve a regular-bid driver's run when the freight to be delivered on that run exceeded the regular-bid drivers' capacity. "Unassigned drivers" and "preferential casual" drivers worked when none of the "regular bid" or "wild bid" drivers were available. Assignments from these four groups were made according to seniority lists. When no drivers from those groups were available, the local dispatchers resorted to a list of "casual casual" drivers who have been approved by the company personnel, safety, and security departments. When a "casual casual" driver was needed, the local dispatcher had discretion to choose the "casual casual" driver he thought could best perform the task.

The local dispatchers had discretion to give pickup assignments to the local driver whom they thought could best perform the task.

In support of the finding that the local dispatchers were not supervisors during the period under consideration, the Board stated that the assignment of drivers to loads was thoroughly routinized, that economic consideration governed the local dispatchers' decisions, and that the terminal manager was the true supervisor of the local drivers. But the record does not support the Board's findings.

Although a union contract automatically determined the assignment of drivers in most instances, the local

dispatcher possessed and exercised discretion in the assignment of drivers. Local dispatcher, P. O. Church, a witness for the General Counsel, testified that, on occasion, he had sent drivers into areas and assigned starting times for which they had not bid when he determined that such assignments were necessary to move freight. (Tr. 199-200). In opposition to Church's testimony, the Board referred us to local dispatcher Merritt's general description of how he assigned drivers. Testifying for the company, Merritt said "It is basically the same thing every day . . . it is just the bids well, the only time it would change . . . is when you use the wild men." (Tr. 1133). But Merritt did not really contradict Church for it is clear that Merritt spoke only in general terms.

Merritt later stated that he might require a driver to go outside of "his area" to make a pick-up. (Tr. 1138).[3] Church also stated that he had discretion in assigning drivers to pick-up freight. (Tr. 137). Although Church indicated that a driver's equipment affected his decision, it seems clear that where several drivers had the equipment and space necessary to make a pick-up, the local dispatcher had discretion to select the driver for the task.

It is also clear that local dispatchers had discretion to choose which of the approved casual casual drivers would actually be given assignments. (Tr. 215-17). Church said that he selected them according to availability and location. (Tr. 151). Merritt corroborated Church and further noted that his evaluation of a driver entered into his selection. (Tr. 1152-53).

---

[3] Even if Merritt's testimony is interpreted as contradicting Church's testimony, the administrative law judge's resolution of the credibility of conflicting testimony is entitled to great weight. Here the administrative law judge apparently believed Church for he found that the local dispatchers did have the authority to depart from the bid system in assigning drivers when they determined that the situation required it. (App. 57).

The Board contends that the local dispatcher's discretion in choosing casual casual drivers for assignment is not relevant because the company was not using casual casual drivers at the time of the hearing. Pilot responds that it was not using casual casual drivers at the time of the hearing because its business had not yet recovered from the effects of a strike that occurred several months after this dispute arose. There is no evidence indicating that at the time involved here, the local dispatcher's authority to assign casual casual drivers was only theoretical. Although the dispatcher may not have exercised that authority at the time of the hearing, they did exercise it at the time this dispute arose. In any event it is "not the exercise of authority but the delegation of authority which is indicative of the attributes of a supervisor." *NLRB* v. *Southern Seating Co.*, 468 F. 2d 1345, 1347 (4 Cir. 1972).

The local dispatcher's decision regarding the amount of work assigned to a driver for the day directly affected a driver because it could determine whether and how much overtime was allocated to that driver. Both Church and Merritt agreed on this point. (Tr. 156-57, 1146). The Board does not point out any evidence to the contrary.

Although economic considerations clearly affected the local dispatcher's decisions, the record does not show that economic factors prevented the dispatcher from assigning drivers according to their individual capabilities. Indeed, a driver's ability was a factor involved in the decision as to whether he would be assigned outside his area and how many pick-up assignments would be given him.

Nor does the record support the Board's finding that the terminal manager rather than the local dispatcher supervised the local drivers. Miller, terminal manager at Kernersville at the time this dispute arose, testified that he supervised a variety of operations at the terminal

through various first-line supervisors. Miller said that he was responsible for the office clerks and the warehouse clerks both of whom were directed by a Ms. Beacham, for the rate billing department which was headed by a Mr. Hamer, and for the local dispatchers and local drivers. He specifically said that he did not supervise the local drivers directly but through the local dispatchers. (Tr. 1795). It is difficult to believe, as the Board contends, that Miller served as the first-line supervisor of the 48 local drivers in addition to his other duties.

The Board does not point to any substantial evidence indicating that the terminal manager was the true first-line supervisor of the local drivers.[4] The Board refused to accept the testimony that local dispatchers had the authority to grant time off to drivers (Tr. 1135-40) and to determine initially whether a driver was too drunk to make a run because neither Church nor Merrit could remembe a specific incident where they had granted time off or had determined that a driver was intoxicated and refused to let him accept an assignment. But, as noted above, it is the delegation rather than the exercise of authority which is significant. *NLRB* v. *Southern Seating Co.*, 468 F. 2d 1345, 1374 (4 Cir. 1972). The Board points to no evidence showing that the local dispatchers lacked such authority or that those decisions were the terminal manager's alone. Nor does the Board refer us to any evidence indicating that the terminal manager ever saw or spoke to the local drivers on a regular basis.

---

[4] Although Merritt answered "yes" when asked if the terminal manager was the immediate supervisor of all the drivers as well as the local dispatchers, we have no way of knowing what Merritt understood the term "immediate supervisor" to mean. In view of Merritt's assertion that he had the authority to discipline drivers (Tr. 1141), grant time off (Tr. 1138-40) and vary assignments from that set by the bid system, his apparent admission that the terminal manager was the immediate supervisor of the local drivers is not substantial evidence that the terminal manager was in fact the first-line supervisor.

The Board has not shown that there is substantial evidence to contradict the evidence that the local dispatchers had the authority to assign local drivers to different areas and different times than those for which they had bid, decide the amount of pick-up work given to a driver, select casual casual drivers, and generally act as the first-line supervisor of the local drivers. It is clear that the local dispatchers had the authority "responsibly to direct" the local drivers. There is a substantial possibility that the fraternal feelings engendered by union membership would threaten the ability of a local dispatcher with such responsibilities to exercise his authority in his company's best interest. Therefore we find that the Board's determination that the local dispatchers were employees rather than supervisors was not supported by substantial evidence.

(b) Line-haul dispatchers were responsible for dispatching drivers and freight to terminals and customers beyond a 50-mile radius from Kernersville. The line-haul dispatch operation never closed. One line-haul dispatcher and one dispatch clerk was on duty at all times.[5]

A union contract required that "over-the-road" drivers be assigned to loads on a first-in, first-out basis. The company had to pay a penalty when it departed from the method of assignment set forth in the union contract. Line-haul dispatchers were supervised by a supervisor of road dispatch.

The Board reversed the administrative law judge's finding that the line-haul dispatchers were supervisors because it found that the line-haul dispatchers' primary concern was to move equipment quickly and economically, that the line-haul dispatchers' decisions regarding drivers

[5] Dispatch clerks were originally part of this dispute, but the parties stipulated that dispatch clerks were "employees" because unlike the dispatchers, the clerks received hourly wages, punched a time clock, and did not participate in the company bonus plan.

were governed by explicit company policies and union contract provisions, and that driver supervisors, who were on duty 24 hours a day, actually supervised the over-the-road drivers. But the record does not support the Board's position.

Although the assignment of drivers was often a routine process governed by the union contract, there was testimony that the line-haul dispatchers sometimes had discretion in applying the first-in, first-out system and that the company permitted the dispatchers to depart from the contract assignment system and use their own discretion in assigning drivers under certain circumstances. The Board does not show any substantial evidence contradicting that testimony.

The General Counsel's own witness, line-haul dispatchers, Grady Kiser, testified that even under the union contract, he had discretion to select drivers when two loads of a similar category were to depart simultaneously and when many loads departed in a short period of time. Kiser also admitted that he did select particular drivers for certain loads. (Tr. 513-14).

Lonnie Booe, the supervisor of the line-haul dispatchers, testified that the line-haul dispatchers often intentionally departed from the assignment order mandated by the union contract and "ran around" one driver for another. He indicated that the benefit of the superior service or availability of some drivers was worth the penalty for violating the contract.

The Board does not show any evidence contradicting Kiser's statement. But it does attempt to show that line-haul dispatchers had no discretion to deliberately violate the union contract and "run around" a driver. The Board points to Driver Supervisor Wade Seal's testimony that a dispatcher was not doing his job right when he deliberately ran around a driver (Tr. 1414(2)) and the

portion of Booe's testimony where Booe obviously wished to avoid stating that the company had a policy of permitting deliberate run-arounds. (Tr. 1344). The evidence, however, clearly shows that the company condoned, and perhaps encouraged, run arounds where the dispatchers felt that the benefits outweighed the penalty under the contract. Seal did not assert that company policy prohibited run arounds. He admitted that the practice continued even though he had complained to the dispatchers and the dispatchers' supervisor and that no one had been fired for making deliberate run arounds. (Tr. 1414(2)-(4)). Although reluctant to state that there was a policy permitting deliberate run-arounds, Booe clearly stated that the company condoned them (Tr. 1345) and defended the practice as the only way to get the loads moved under some circumstances. (Tr. 1302-04, 1344-45).

As additional support for our finding here, we note that the Regional Director of Region 12 has found that Pilot's line-haul dispatchers in Florida have "authority to deviate from the contract terms if they decide that a driver is not qualified or it would be faster and more efficient to dispatch on another basis." *Pilot Freight Carriers, Inc. and Truck Drivers, Warehousemen and Helpers Local Union 512*, No. 12-RC-5204 (November 22, 1976). The Board has refused to review the Director's decision. The Regional Director noted that Pilot's Florida terminal was different from the Kernersville terminal because driver supervisors were on duty at all times at Kernersville and not in Florida. But the Board has not directed us to any evidence that the driver supervisors at Kernersville had anything to do with the dispatchers' authority to depart from the contractual assignment procedure and incur penalties when they found it expedient to do so.

There was also substantial testimony that the line-haul dispatchers had discretion to decide whether a

driver who arrived late should be permitted to take his load or should be sent to the driver supervisor. Grady Kiser, a line-haul dispatcher testifying for the General Counsel, testified that when a driver arrived 30 or 45 minutes late, the dispatcher had to decide whether the driver had been so unreasonably late that he should be sent to the driver supervisor. Kiser also said that the dispatcher was the only one who determined initially whether a driver had been unreasonably late (Tr. 525-27) and that he, Kiser, had permitted drivers to report late and switch loads with another driver in order to avoid missing a load. (Tr. 527-28).

The Board argues that the dispatcher exercised no independent judgment in handling drivers who reported late. It asserts that the dispatcher routinely permitted a 30-minute grace period for some priority loads and that the dispatcher was required to send a driver to the supervisor if the driver were more than a half hour late. (NLRB brief p 23 n.33). But it is clear that the Board has misconstrued Kiser's testimony. The portions of the transcript upon which the Board relies show that there was no firm requirement regarding a 30-minute grace period. Although Kiser insisted that the driver supervisor rather than the dispatchers decided how to discipline a late driver, Kiser made it very clear that only the dispatchers had the discretion to determine whether drivers would be referred to the supervisor and that there was no penalty for reporting late unless the dispatcher forced a driver to see the supervisor. (Tr. 408-10, 527-28). Thus there is no substantial evidence supporting the Board's finding that the line-haul dispatcher had no discretion in handling late drivers.

Finally there was substantial testimony that the line-haul dispatcher had the responsibility to determine whether a driver was intoxicated and should be sent to the driver supervisor on charges of reporting for work

in an intoxicated condition. (Tr. 411, 1297). The Board contends that there is no supervisory responsibility involved in reporting drunk drivers because company policy and government regulations prohibit the company from allowing an intoxicated driver to depart. But the record clearly shows that the company relied on the dispatcher to detect and report intoxicated drivers. The dispatcher had to decide whether a driver's condition required that he be sent to the supervisor. Although the dispatcher merely forces a driver to go to the supervisor,[8] that in itself is a form of discipline.

When this dispute arose, the company depended upon the line-haul dispatchers to prevent inebriated drivers from going out on the road, to ensure that drivers were not allowed to be unreasonably late in reporting for

---

[8] The Senate implicitly rejected an argument similar to that made by the Board regarding the driver supervisors being the only true supervisors of these drivers when it added the words "or responsibly direct them" to the definition of employer in § 2(11). In proposing the amendment Senator Flanders said

> Many of the activities described in paragraph (11) are transferred in modern practice to a personnel manager or department.
>
> In fact, under some modern management methods, the supervisor might be deprived of authority for most of the functions enumerated and still have a large responsibility for the exercise of personal judgment based on personal experience, training, and ability. He is charged with the responsible direction of his department and the men under him. He determines under general orders what job shall be undertaken next and who shall do it. He gives instructions for its proper performance. If needed, he gives training in the performance of unfamiliar tasks to the worker to whom they are assigned.
>
> Such men are above, the grade of "straw bosses, lead men, set-up men, and other minor supervisory employees". . . . Their essential managerial duties are best defined by the words, "direct responsibly," which I am suggesting.
>
> In a large measure, the success or failure of a manufacturing business depends on the judgment and initiative of these men. 2 *Legislative History of the Labor Management Relations Act of 1947* 1303 (1947)

duty, and to "run around" a driver or permit a driver to switch loads if necessary to meet the company's obligation to deliver freight on time.

It is clear that the line-haul dispatchers possessed the authority "responsibly to direct" the drivers as well as some of the other supervisory authorities listed in § 2(11). Undivided loyalty from its line-haul dispatchers in the exercise of their discretion was essential to the company. The record does not support the Board's finding that these dispatchers were "employees" rather than supervisors.

(c) Central dispatchers were responsible for moving freight in a manner which would maximize profits. Two were on duty at all times. They were supervised by a director of central dispatch.

The central dispatchers assigned departure times to most loads leaving Kernersville and also to loads leaving other terminals when they were closed at night or on weekends. They communicated with all of Pilot's terminals by teletype and telephone. One of their major functions was to keep track of each trailer and to monitor the conditions at each of Pilot's forty-one terminals at all times. Another function of the central dispatchers was to receive all communications from drivers once they were on the road.

The Board rejected the administrative law judge's conclusion that the central dispatchers were "supervisors" because it found that the central dispatchers merely exerted direction and control over the movement of equipment and that their direction of personnel was only an incidental part of their direction of equipment. The Board's opinion admits that central dispatchers decided which load was the first to leave a terminal that had been closed for the night, whether to overrun a terminal by sending in more drivers than were needed to

carry away the outgoing freight, and other things that admittedly could increase or decrease a driver's pay. Yet it states that those decisions involved the weighing of economic factors rather than any real employee supervision. Furthermore, the Board found that well-defined company policies deprived the central dispatchers of any real discretion in the instructions which they gave to drivers and that the driver supervisors were the true supervisors of the over-the-road drivers.

But the record indicates that the Board failed to recognize the supervisory function performed by the central dispatchers in deciding whether to permit drivers to stop driving early or vary his route for personal reasons. There is substantial testimony that the central dispatcher had discretion to grant or deny a driver's request to stop driving early or detour from his route for personal reasons. (Tr. 834-37, 839-41, 935-37, 1739-40).

The Board contends that the company had a specific policy of permitting drivers to stop early if the company lost no more than one hour of driving time and the driver saved the company the cost of a motel room by staying with relatives. (NLRB brief at 30). But the Board misconstrues the testimony upon which it relies. The testimony cited in the Board's brief shows that central dispatchers considered several factors including their personal evaluation of a driver in handling such a request. It does not show any clear company policy which deprived the central dispatchers of discretion.

The Board also argues that the driver supervisors have preempted any supervisory authority that the central dispatchers may have had regarding request [sic] for time off or route variation. (NLRB reply brief, p. 6). But again the Board misconstrues the testimony upon which it relies. The testimony cited by the Board does not show that driver supervisors alone controlled the decision to grant time off for personal reasons once the supervisors

began to be on duty 24 hours a day. It shows that the central dispatchers were familiar with some drivers, handled some requests for time off without consulting a driver supervisor, and played a major part in the decision to grant time off for personal reasons even when a supervisor was consulted. (Tr. 957, 1394-96). Although it seems that the central dispatchers may have abused their authority by letting too many drivers have time off to visit the dog tracks in Florida and that the company had to give the driver supervisors more control over time-off requests from drivers in that area, the Board has not pointed to any testimony stating that the driver supervisors alone decided whether to grant requests for time off or route variances for personal reasons.[7]

The portions of the record noted in the Board's briefs indicate that the company relied upon the central dispatchers to determine when requests for time off could be granted and that the dispatchers were aware of the effect of their decision upon the driver. It is clear that there was a substantial possibility that a fraternal union relationship between central dispatchers and drivers could have impaired the dispatchers' ability to make their decisions in the company's best interests. Thus, we find that the Board's conclusion that the central dispatchers were "employees" rather than "supervisors" is not supported by substantial evidence.

Our finding that the Board erred in classifying the dispatchers as "employees" rather than "supervisors" [8]

---

[7] See note 6 on page 18 *supra*.

[8] We note that our decision here is in accord with the decisions of other circuits rejecting, although in different factual contexts, the Board's attempts to treat dispatchers as "employees" under the National Labor Relations Act. *See* NLRB v. Metropolitan Petroleum Co., 506 F.2d 616 (1st Cir. 1974); NLRB v. Gray Line Tours, Inc., 461 F.2d 763, 764 (9th Cir. 1972); Pacific Intermountain Express Co. v. NLRB, 412 F.2d 1, 2-4 (10th Cir. 1969); Eastern Greyhound Lines v. NLRB, 337 F.2d 84 (6th Cir. 1964).

disposes of the 8(a)(1), (3) and (5) charges regarding the dispatchers. Since the dispatchers were already supervisors when the company issued the job descriptions and initiated the training program, the company did not violate the Act by altering the dispatchers' duties without consulting the union and cannot be accused of attempting to deprive the dispatchers of their rights by unilaterally changing the dispatchers into "supervisors." In view of the supervisory status of the dispatchers, the company was also free to talk with them about their union activities.

Although the company's director of central dispatch took dispatch clerk Oscar Hill into his office and spoke with him concerning the union, that conversation is the only one that could be violative of the Act. In view of the absence of any other violation on the part of the company, the conversation with Hill becomes an isolated incident which does not require the entry of a formal cease and desist order even though Hill was an "employee" and was protected by the Act from coercive interrogation regarding his union activities.

Therefore we decline to enforce the Board's order.

ENFORCEMENT DENIED.

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

June 29, 1977

TO: Elliott Moore, Esq.
Paul Spielberg, Esq.
Andrew Tranovich, Esq.
Angelo V. Arcadipane, Esq.
Robert M. Baptiste, Esq.
Gary S. Witlen, [sic] Esq.
J. W. Alexander, Jr., Esq.
John O. Pollard, Esq.

CLERK'S MEMORANDUM

In compliance with Rules 36 and 45(c) of the Federal Rules of Appellate Procedure, you are advised that the judgment in case No. 76-1089 was entered this date. A copy of the court's opinion, and a blank bill of costs (omitted in criminal cases) is enclosed.

I would invite your particular attention to Rules 39 (c), 40(a), and 41(b) of the Federal Rules of Appellate Procedure.

Please be advised that the policy of this court requires that petitions for rehearing, regardless whether the case was fee paid or in forma pauperis, be filed in *fifteen* copies.

Where it has been determined that a stay of the mandate is an appropriate course of action, then an original petition only (no copies) to stay the mandate need be filed.

WILLIAM K. SLATE, II
Clerk

APPENDIX B

PILOT FREIGHT CARRIERS, INC. and CHAUFFEURS, TEAMSTERS and HELPERS LOCAL UNION NO. 391, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN and HELPERS OF AMERICA.

Cases 11-CA-5506, 11-CA-5642, and 11-CA-5718

December 5, 1975

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND PENELLO

On March 28, 1975, Administrative Law Judge Benjamin K. Blackburn issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The complaint alleges that pursuant to a settlement agreement executed by the parties in August 1973 the Union has been the collective-bargaining agent for the Respondent's central, line-haul, and local dispatchers as part of an office clerical unit; that in response to the concerted activities of these dispatchers Respondent in violation of Section 8(a)(3) issued job descriptions and instituted a supervisory training program in an attempt to convert these dispatchers into supervisors within the meaning of Section 2(11) of the Act; and that these actions, taken without the benefit of bargaining with the Union, were in violation of Section 8(a)(5). The complaint further alleges that Respondent committed certain independent violations of Section 8(a)(1) to discourage the union activity of these dispatchers.

The Administrative Law Judge found that the dispatchers exercised independent judgment in responsibly directing drivers and thus were supervisors even before Respondent allegedly converted them to that status. He also found that, even if mistaken about the supervisory status of the dispatchers, Respondent's conduct was not in violation of Section 8(a)(3) or (5). In his view, the settlement stipulation which the General Counsel relies upon left in question the employee status of these dispatchers and, until the question of their status was resolved, Respondent had no obligation to bargain. The Administrative Law Judge rejected the contention that Respondent's alleged conversion of dispatchers into supervisors was inherently destructive of their Section 7 rights or that Respondent had the burden of explaining its conduct. He found that, even if the Respondent's conduct was as alleged, Respondent had proven that it was motivated by the good-faith belief that the dispatchers had always been supervisors and its issuance of job descriptions and initiation of a training program were not meant to interfere with Section 7 rights. The Administrative Law Judge also dismissed the independent violations of Section 8(a)(1) since the allegations were essentially grounded on conduct affecting individuals he found to be supervisors.

We note at the outset the Administrative Law Judge's discussion of the lack of credibility issues in this case.

He believed that witnesses for the Respondent and for the General Counsel testified truthfully about their duties and supervisory functions, and whether or not they had been told that they had supervisory authority. Thus, the real problem was one of drawing conclusions from lengthy testimony. Some dispatchers were told they had supervisory authority; some were not so told. Some testified that they used discretion in putting a "better" driver on a load; others that this was taken care of by applying the first-in, first-out provision of the union contract, and so on. From this testimony the Administrative Law Judge concluded that the day-to-day dispatcher job added up to the use of independent responsible direction of the various drivers. We reach a contrary conclusion after analyzing the testimony and the contentions of the parties.

To us it appears that actual supervision of over-the-road drivers who work in and out of this busy Kernersville terminal—a main break-bulk terminal for the East Coast, except Florida—is provided by *driver supervisors*, one of whom is always on duty at Kernersville. Their function is to assist the director of driver personnel in supervising over-the-road drivers. They check the incoming trip cards of drivers, examine tachographs, and handle reprimands and grievances. Tachographs, among other items, will reflect whether a driver has deviated from his orders. By contrast, the function of *central dispatchers* is to move the freight and equipment in the most expeditious and lucrative manner for the Respondent, a function carried out pursuant to established guidelines and with constant reference to charts that line the walls of the central dispatch room and show the location of equipment and driver availability.[1]

[1] Respondent has issued a comprehensive manual detailing what procedures are to be followed for dispatching the equipment and for providing a driver with any necessary instructions. Additional guidelines not set out in the manual are issued in the form of memoranda that usually relate to a specific subject. The collective-bargaining contracts and the Department of Transportation's motor safety regulations are additional guideposts that must be followed.

Two central dispatchers are on duty at all times, one for north traffic and one for south traffic. Drivers are told to contact them if delayed. The major worktime of central dispatchers is devoted to telephone communications with other terminals and with drivers. Among the decisions made by central dispatchers are which load to pull first out of a terminal closed for the night, whether to overrun a terminal and miss certain loads, and whether to permit a terminal to rent equipment. Central dispatchers are themselves supervised by a director of central dispatch, one of whose functions is to issue written directives, for example:

> Advances are to be issued only to pay fines or in extreme emergencies, or if a driver has been out several days and is staying out and needs money for tolls, etc. All other requests are to be referred to the *driver supervisor* on duty. [Emphasis supplied.]

We cannot agree that central dispatchers "still use independent judgment" in applying such a directive. Similarly, authorization of a driver to break a seal on a trailer when the load has shifted, or to hire casual help to unload, is pursuant to well defined company policies. Department of Transportation regulations obviously prohibit assignment or continued driving by those who are intoxicated or ill, and require rest periods for over-the-road drivers at set intervals. The fact that directions in the interest of expediting frieght may affect a driver's pay—up or down—is not in itself indicative of the exercise of supervision within the meaning of the Act. As the Administrative Law Judge has stated, a central dispatcher "weighs the economics" in giving his directions. In our view these central dispatchers are, like the radio dispatchers in *The Baltimore Transit Company and The Bal-*

timore Coach Company, 192 NLRB 1260 (1951), merely exerting direction and control over the movement of equipment, and the direction of personnel by them occurs only as an incidental result, hence they are not supervisors within the meaning of Section 2(11) of the Act.[2]

At the time of hearing there were three *line-haul dispatchers* at Kernersville with primary responsibility for coordinating with the warehouse the hooking of trailers to tractors, calling in over-the-road drivers to take the loads, punching them out when the equipment is ready, and supplying them with a manifest, bills for the frieght, and a trip ticket. The latter may include special instructions for transporting or delivering. In the operation there are also four dispatch clerks who man the phone and the typewriter and work as a team with the dispatchers. This office works round the clock and one dispatcher and one clerk are on duty at the same time.

The Administrative Law Judge has described this relationship graphically as a journeyman-helper situation but nonetheless found, as urged by the Respondent, that the line-haul dispatchers supervised the dispatch clerks after the revised job descriptions were issued.[3] Dispatch clerks, as the parties agree, are within the unit. When a driver arrives with freight, the dispatcher or the clerk (if he happens to be "manning the window") marks the time of arrival and the driver then turns the trip card over to the driver supervisor.

When a driver who has been called to take a load does not show up on time, a dispatcher may give the trip to the next available man, thus automatically putting the

---

[2] *Spector Freight System, Inc.*, 216 NLRB No. 89 (1975).

[3] Contrary to the Administrative Law Judge, we find that the dispatchers do not supervise clerks. His finding is based on a single discharge, but, as we read the record, the dispatcher did not do the firing and, as the Administrative Law Judge admits, the incident was arguably staged.

first driver at the bottom of the list. On occasion, if the list of regular drivers is exhausted, the dispatcher may assign a casual driver, or may even request that an incoming driver "turn on the yard" and go out again immediately with a new load. In performing these duties the line-haul dispatcher's overriding interest and concern—like that of the central dispatcher in his work—is the movement of equipment in the fastest, most economical way possible. The incidental impact this may have on drivers is not in our opinion the exercise of supervision within the meaning of the Act. Significantly, these dispatchers are themselves supervised by the director of line-haul dispatch.

We come now to the dispatch of local freight within a 50-mile radius. For this operation there are two *local dispatchers* who are supervised by the terminal manager. The latter has no responsibility with respect to central or line-haul dispatch. Local dispatch is a 5-day-a-week operation, with one dispatcher arriving about 6 a.m. and the other leaving between 7 and 8 p.m. Each year local drivers bid, by seniority, for local runs. Those with less seniority bid for hours. There are also preferential casual drivers who come under the contract and are called by seniority, and casuals who have no seniority but are on a roster and are paid the specified contract rate.

The local dispatchers punch out local drivers, who keep in touch with the terminal during the day for instructions on additional pickups and problems that may arise. Despite the fact that the record shows that the assignment of drivers to loads is thoroughly routinized, the Administrative Law Judge found the exercise of independent judgment by local dispatchers based on authorizing overtime pay when a pickup is delayed for some reason or not available at the time estimated by the local dispatcher; requesting that the driver change his lunchtime from that provided by the contract

or agreeing to that arrangement if the driver has a personal errand; authorizing the hire of casual labor to unload; and approving or disapproving the delivery of a c.o.d. without payment. In our view, such decisions are essentially dictated by economic considerations, for which the Employer has provided comprehensive dispatching procedures. Although there is no personnel termed a driver supervisor for the local drivers, we conclude that the terminal manager has authority to hire, discharge, and discipline local drivers and to direct them to the extent not covered by company procedures.

Accordingly, we see nothing in this record to support a finding that local dispatchers are supervisors within the meaning of the Act.

Unfair Labor Practices

We have found that Respondent's dispatchers are employees rather than supervisors, and entitled to the protection of the Act.[4] The question then concerns the alleged 8(a)(1) interference with Section 7 rights and 8(a)(3) discriminatory effect of the 1973 job descriptions which on their face imply supervisory authority, and of the 1974 initiation of supervisory training meetings for dispatchers, as well as the 8(a)(5) impact of unilaterally taking such steps without consulting the recognized bargaining representative.

In August 1973 the Union and the Respondent entered into a settlement stipulation of several outstanding unfair labor practice proceedings, wherein the parties

[4] Based upon the evidence that Respondent's dispatchers do not formulate, determine, and effectuate Respondent's business policy and that their decisions conform to established operating guidelines, we find that the dispatchers are not excluded from the protection of the Act as managerial employees. *N.L.R.B.* v. *Bell Aerospace Company, Division of Textron, Inc.*, 416 U.S. 267 (1974). See also *Spector Freight System, Inc.*, 216 NLRB No. 89 (1975).

agreed to a "final and binding card check" to "resolve the representation issues," except that Respondent reserved the right to litigate the employee status of dispatchers in a unit clarification proceeding before this Board. Several days after the card check, which showed as to dispatchers that 14 of the 19 had chosen to be represented by the Union, Respondent filed a unit clarification petition in an effort to resolve the status of the dispatchers. However, in September Respondent issued the disputed job descriptions covering dispatchers which, in our view and that of the Administrative Law Judge, outlined supervisory duties. Later, in February 1974, Respondent, also as found by the Administrative Law Judge, instituted a supervisory training program for dispatchers. Respondent's actions, following closely a demonstrated majority of dispatchers in favor of union representation and before resolution of the supervisory issue, were, we find, interference, restraint, and coercion with respect to employee protected activity in violation of Section 8(a)(1), as well as discrimination to discourage union activity in violation of Section 8(a)(3). Contrary to the Administrative Law Judge, we find it immaterial that Respondent had, in taking these steps, a good-faith belief that its dispatchers were already supervisors within the meaning of Section 2(11) of the Act.[5]

In reaching this conclusion we note that these job descriptions, while purporting to reflect supervisory responsibilities, do not accurately reflect the job functions performed either at the time they were distributed or at the time of hearing. Except as to the three line-haul dispatchers, there is no background of issuing job descriptions for dispatchers, and the timing of these and of the supervisory training program pending a deter-

[5] See *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34 (1967).

mination of the supervisory issue—a period when the requisite preservation of the status quo would have been especially desirable to promote a prompt resolution of the issue unclouded by what we view as attempts to influence the result—is not explained by this record on the asserted ground that Respondent was simply codifying the supervisory authority already possessed by its dispatchers.

With respect to the refusal-to-bargain allegation, we find, contrary to the Administrative Law Judge, that Respondent, having reserved the right to litigate the status of dispatchers as supervisors, had an obligation to consult with the Union that did not hinge upon resolution of the issue. While resolution of the supervisory issue was pending, it acted at its peril in not consulting the Union concerning the issuance of the job descriptions and the supervisory training program. Accordingly, we find that the Respondent violated Section 8(a)(5) of the Act.[6]

The General Counsel urges the Board to make findings of 8(a)(1) and (3) violations without regard to the existence of an unlawful motive. While we agree that the acts of Respondent taken during the period when the supervisory issue was unresolved were inherently destructive of the important employee right under Section 7 to be represented for bargaining with fellow employees unless determined, by unit clarification, to be supervisors, and that an 8(a)(3) finding here may also be appropriate without specific evidence of union animus, we note that this is not a case where that antiunion motivation is lacking. On four occasions in April 1974, the Respondent through its director of central dispatch

[6] In this connection see *Mike O'Connor Chevrolet-Buick-GMC Co., Inc., and Pat O'Connor Chevrolet-Buick-GMC Co., Inc.*, 209 NLRB 701, 703 (1974), concerning the peril of making postelection changes in working conditions, absent compelling economic considerations for doing so, during pendency of objections.

urged its employees to "forget about the Union" and to withdraw their support from it, as the Administrative Law Judge found based upon uncontroverted testimony. Two occasions involved central dispatchers, one a line-haul dispatcher, and one a dispatch clerk. The Administrative Law Judge treated the latter incident as isolated, and found no violation as to the conversations with dispatchers because of their supervisory status. As we have concluded that all dispatchers are employees, we find these conversations to be independent violations of Section 8(a)(1) which supply explicit evidence of the discriminatory purpose underlying the issuance of job descriptions and the institution of the training program which constitute the 8(a)(3) violations we have found.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Pilot Freight Carriers, Inc., Kernersville, North Carolina, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees concerning their activities in support of a labor organization.

(b) Coercively interrogating employees concerning their involvement in a labor dispute.

(c) Unlawfully threatening to discharge employees because of their activities in support of a labor organization.

(d) Unlawfully requesting or directing employees to withdraw their union authorization cards.

(e) Unlawfully requesting or directing employees to abandon the Union and to deal directly with Respondent.

(f) Unilaterally issuing job descriptions or instituting supervisory training for dispatchers.

(g) Attempting to change the duties and responsibilities of its employees because said employees joined or assisted the Union or engaged in other activities protected by Section 7 of the National Labor Relations Act, as amended.

(h) Refusing to bargain collectively concerning the inclusion of dispatchers in the unit covered by the terminal office employees contract with Chauffeurs, Teamsters and Helpers Local Union No. 391, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative in the following collective-bargaining unit:

> All terminal office employees and maintenance office employees employed by Respondent at its Kernersville, North Carolina, terminal, including dispatchers but excluding log clerks, guards, salesmen, confidential, managerial, and supervisory employees.

(i) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist Chauffeurs, Teamsters, and Helpers Local Union No. 391, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other right guaranteed them under Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the purposes and policies of the Act:

(a) Rescind the 1973 job descriptions and 1974 training program as they apply to dispatchers.

(b) Upon request, bargaining with the above-named labor organization for the inclusion of dispatchers in the unit covered by the terminal office employees contract.

(c) Post at its place of business in Kernersville, North Carolina, copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 11, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 11, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

---

[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

After a hearing at which all sides had the opportunity to present their evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act, and has ordered us to post this notice and we intend to carry out the Order of the Board.

The Act gives all employees these rights:

To engage in self-organization
To form, join, or help unions
To bargain collectively through a representative of their own choosing
To act together for collective bargaining or other mutual aid or protection
To refrain from any and all these things.

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT coercively interrogate you regarding your union membership, activities, or desires, or your involvement in a labor dispute.

WE WILL NOT threaten to fire or take any action against any of you because you have joined or supported, support, or will support a labor organization of your choice, including Chauffeurs, Teamsters and Helpers Local Union No. 391, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

WE WILL NOT request and direct employees to withdraw their union authorization cards.

WE WILL NOT request and direct employees to abandon the Union and deal directly with management.

WE WILL NOT issue job descriptions or institute supervisory training programs for dispatchers without first bargaining with your collective-bargaining representative.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid, or to refrain from any or all such activities.

WE WILL rescind the 1973 job descriptions and 1974 training program as they apply to dispatchers.

WE WILL, upon request, bargain for the inclusion of the dispatchers in the contract unit.

You and all our employees are free to become members of any labor organization, or to refrain from doing so.

PILOT FREIGHT
CARRIERS, INC.

DECISION

STATEMENT OF THE CASE

BENJAMIN K. BLACKBURN, Administrative Law Judge: The charge in Case 11-CA-5506 was filed on October 4, 1973. The charge in Case 11-CA-5642 was filed on February 27, 1974. The cases were consolidated for hearing and a consolidated complaint was issued on April 22, 1974. The charge in Case 11-CA-5718 was filed on April 29, 1974. All three cases were consolidated for hearing and an amended consolidated complaint was issued on May 30, 1974. The hearing was held in Greensboro, North Carolina, on June 27 and November 6, 7, 8, 9, 11, 12, 13, 14, 18, 19, 20, and 21, 1974. The principal issue litigated was whether dispatchers employed at Respondent's terminal at Kernersville, North Carolina, were as of August 24, 1973, employees or supervisors within the meaning of Section 2(11) of the National Labor Relations Act, as amended. For the reasons set forth below, I find that they were supervisors and that, therefore, Respondent did not violate Section 8(a)(1), (3), and (5) of the Act by issuing job descriptions on September 26, 1973, which explicitly set forth their supervisory authority and responsibilities and by instituting a supervisory training program for them in February 1974.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of briefs, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a North Carolina corporation, is engaged in various States in the interstate motor transportation

of freight pursuant to a license granted by the Interstate Commerce Commission. During the 12 months immediately preceding issuance of the amended consolidated complaint in this proceeding, Respondent grossed more than $500,000 and received shipments of goods valued in excess of $500,000 at its Kernersville, North Carolina, terminal directly from points outside the State of North Carolina.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Due-Process Issues*

1. How they arose

Respondent's drivers, both over-the-road and local, are represented by the Teamsters. At the Kernersville terminal the contract is between Respondent and Teamsters Local 391. In the spring of 1973 Local 391 undertook to organize other employees at the Kernersville terminal. In its initial contact with Respondent about the matter in mid-May, the Union asked for a unit of terminal office employees. In late June, when serious discussions began, the Union first mentioned that it wanted to include dispatchers. When telephone communications in early July failed to elicit a response from Respondent as to whether it would grant recognition to Local 391, the Union sent a formal demand letter. This led to a meeting on July 9, 1973, at which Respondent took the position that dispatchers were managers or supervisors within the meaning of the Act. On July 13 terminal office employees staged a 1-day strike in support of their demand that Respondent recognize Local 391 as their bargaining representative. Dispatchers did not participate in the strike. The strike resulted in a spate of litigation, including a charge and a petition filed with the Board's regional office in Winston-Salem and an injunction proceeding filed in United States Dis-

trict Court. When the latter came to trial on August 24, 1973, Respondent and the Union settled their dispute on the courthouse steps. A document entitled "Settlement Stipulation" which they executed that day provided for a card check to be conducted by a named arbitrator to determine whether Local 391 represented a majority of office employees at the Kernersville terminal. It also provided that the arbitrator would resolve "all issues which may arise in the above mentioned card check," save only the question of whether dispatchers "are supervisors or managerial employees within the meaning of the National Labor Relations Act." As to that issue the right was reserved to Respondent to have it resolved in a Board unit clarification proceeding. The last two paragraphs of the stipulation read:

> 7. The Employer and Union agree to withdraw with prejudice all litigation, charges and petitions, including litigation against the International Brotherhood of Teamsters, arising out of this controversy, specifically United States District Court No. C-228-WS-73 and NLRB Cases 11-CA-5394 and 11-RM-201. Thereafter neither the Employer nor the Union shall file any litigation, charges or petitions in the courts or before the National Labor Relations Board encompassing any part of the controversy leading up to the execution of this settlement stipulation, or arising out of the same, except in enforcement of this settlement stipulation. In addition, neither party will aid, abet, encourage or cause any third parties to file any such litigation, charges or petitions grounded in the instant controversy.
>
> 8. All issues of alleged violations of the terms of this agreement shall be submitted to the arbitrator, who shall have full authority to resolve such issues, including cease and desist powers. The arbitrator shall, if possible, order a hearing upon twenty-four hours notice to the parties. The arbitrator's decision shall be final and binding and enforceable in the Federal District Court.

All litigation, including the Labor Board charge and petition, was withdrawn as agreed. The card check was held on August 28, 1973, at which time the arbitrator determined that 49 of 73 office employees other than dispatchers and 14 of 19 dispatchers had requested representation by Local 391 by executing valid authorization cards. Respondent thereupon granted recognition to Local 391 in a unit of "Kernersville, North Carolina office employees including the maintenance office, excluding log clerks, supervisors, managerial employees, guards, salesmen, confidential employees, and all employees covered by existing labor agreements." Resolution of whether dispatchers were in the unit as office employees or out as supervisors or managerial employees was not permitted to delay negotiations. A contract covering the unit was executed on December 7, 1973.

Pursuant to the settlement stipulation, Respondent filed a unit clarification petition. (Actually, it filed two, Case 11-UC-14 on September 5, 1973, and Case 11-UC-15 on September 20. Why the first was withdrawn and the second substituted for it is not clear in this record.) An extensive hearing was held in Case 11-UC-15 before a Regional Office Hearing Officer, closing, apparently, in January 1974. In the meantime, the first of the three cases involved in this proceeding, Case 11-CA-5506, had erupted.

Respondent issued written job descriptions on September 26, 1973, covering each of the three types of dispatchers who work at the Kernersville terminal. Each contained explicit statements of authority which, if actually possessed by the dispatchers in that category, clearly made them supervisors within the meaning of the

Act. Included among the 27 "authorities, duties, and responsibilities" on the document titled "Job Description for Central Dispatchers" are, for example:

12. Authority to grant time off to drivers while on route. This authority involves extension of break times and rest periods as the need arises.

* * * *

15. Authority to originate reprimands for drivers due to faulty performance.

16. Authority to discharge a driver while enroute for violation of company policies or contract provisions.

* * * *

20. Authority to initiate the hiring and/or assigning part-time help on weekends. This involves utilization as the need arises of local drivers based at various terminals throughout the system for over-the-road work assignments.

Among the 22 on the document titled "Job Description for Long-haul Dispatchers" are, for example:

9. Authority to grant time off or to assign overtime work to the dispatch clerks as the need arises.

10. Authority to discharge or to effectively recommend the discharge of a dispatch clerk.

11. Authority to recommend pay raises and promotions for dispatch clerks.

* * * *

16. Authority to reprimand drivers and recommend further disciplinary action to the driver supervisor if infractions of the contract and company standards come to the attention of the line-haul dispatcher.

* * * *

20. Authority to grant time off to drivers. This authority also refers to vacation time and sick time except that the line-haul dispatcher shall coordinate with the driver supervisor before granting time off for vacation and sickness.

Among the 20 on the document titled "Job Description for Local Dispatchers" are, for example:

7. Authority to hire part-time employees as the need arises. Local dispatch should maintain a pool of drivers to be utilized as the need arises.

8. Authority to recommend the hiring of part-time employees as permanent employees.

9. Authority to discharge any local driver whose conduct warrants immediate discharge under existing labor agreements.

10. Authority to effectively recommend other disciplinary action relative to local drivers who have violated provisions of existing agreements.

* * * *

14. Authority to grant time off to local drivers as the circumstances so require.

Local 391 filed its charge in Case 11-CA-5506 on October 4, 1973, alleging that Respondent "has attempted to change and/or implement certain changes in the authority and responsibilities of the dispatchers employed at the Kernersville, N.C. terminal in order to convert said dispatchers from the status of employees covered by the Act to supervisors excluded from coverage under the Act" with an intention "to convert said dispatchers to supervisors and, thereby, depriving them of their rights under Section 7 of the Act. This conduct of Respondent "constitutes a cynical attemp to manufacture favorable evidence for use in the unit clarification proceeding (11-UC-15)." (Case 11-CA-5642, another 8(a)(1), (3), and

(5) charge, was triggered by a training program for supervisors to which Respondent began sending the dispatchers in February 1974. Case 11-CA-5718, an 8(a)(1) charge, was triggered by conversations in April 1974 between dispatchers and Sidney Elms, Respondent's director of central dispatch at the time.) The Regional Director dismissed Case 11-CA-5506 on October 26, 1973, and the dismissal was affirmed on appeal to the General Counsel on December 17. However, on December 27, 1973, the Union filed a motion for reconsideration with the General Counsel. That motion was granted and the Regional Director was reversed on April 3, 1974. The case was remanded to the Regional Director for issuance of an 8(a)(1), (3), and (5) complaint. The Regional Director thereupon suspended further processing of Case 11-UC-15 pending litigation of the complaint in Case 11-CA-5506. Respondent asked the Board to reverse him. The Board denied Respondent's appeal in a telegram dated June 26, 1974, and signed by its executive secretary which read, in pertinent part:

> THE BOARD CONCLUDED THAT IN AS MUCH AS EVIDENCE AS TO CERTAIN EMPLOYER CONDUCT, INCLUDING BUT NOT LIMITED TO THE PROMULGATION OF JOB DESCRIPTIONS, WAS INTRODUCED IN THE HEARING 11-UC-15 WHICH EVIDENCE IS RELEVENT TO THE ISSUES THEREIN BUT WHICH EMPLOYER CONDUCT IS ALLEGED IN 11-CA-5506 TO HAVE BEEN VIOLATED [SIC] OF SECTIONS 8(A)(1), (3) AND (5) OF THE ACT THE REGIONAL DIRECTORS DECISION TO HOLD THE UC PROCEEDING IN ABEYANCE PENDING RESOLUTION OF THE ISSUES IN THE UNFAIR LABOR PRACTICE PROCEEDINGS WAS AN APPROPRIATE EXERCISE OF HIS DISCRETION

At the opening of the hearing in this proceeding, Respondent moved for summary judgment. The settlement stipulation entered into by Respondent and Local 391 provides that the only important issue in this proceeding, namely, the status of dispatchers, is to be resolved in a unit clarification proceeding; it provides that Board litigation subsequent to the settlement, other than the UC proceeding, will be limited to enforcement of the settlement stipulation, an element not present in this proceeding; and it provides that all issues of alleged violations of the settlement stipulation, the issue in this proceeding, will be submitted to the arbitrator. The Board has decreed in *Collyer Insulated Wire, A Gulf and Western Systems Co.*, 192 NLRB 837 (1971), that it will defer where the parties before it are also parties to a collective-bargaining agreement providing for arbitration of the controversy alleged to be an unfair labor practice. The settlement stipulation of August 24, 1973, between Respondent and Local 391 is analogous to such a collective-bargaining agreement. Insofar as the rationale of the *Collyer* doctrine is concerned, it is more appropriate for deferral than a generalized grievance and arbitration clause in a contract which concerns itself with things in addition to the resolution of disputes between the parties, for it deals in specific terms with the very controversy which gave rise to it, and the manner which the parties have agreed will be used to resolve any further disputes growing out of it. Therefore, on June 27, 1974, I granted Respondent's motion as to all aspects of the amended consolidated complaint except the allegations of independent violations of Section 8(a)(1) of the Act on the ground that forcing Respondent to participate in this proceeding in addition to the long hearing already held in Case 11-UC-15 was a denial of due process. I adjourned the hearing indefinitely in order to give the General Counsel an opportunity to appeal my ruling to the Board. The Board reversed on September 11, 1974, by a telegram signed by an associate executive secretary which merely stated, in pertinent part, "General Counsel's request for special permission to appeal from ruling of Administrative Law Judge

granting Respondent's Motion for Summary Judgment is hereby granted, the appeal is granted and the Administrative Law Judge is reversed."

When the hearing resumed on November 6, 1974, Respondent filed a motion for partial summary judgment seeking dismissal of the 8(a)(5) portion of the complaint on the ground that the General Counsel had violated the Freedom of Information Act, 5 U.S.C. Sec. 552, by denying its request for material contained in the General Counsel's and the Board's files which would reveal the theory on which the General Counsel alleged that Respondent was under a duty to bargain with Local 391. I denied the motion with leave to seek to reopen the hearing in the event the Supreme Court of the United States issued its decision in *N.L.R.B.* v. *Sears, Roebuck & Co.*, 480 F.2d 1195 (1973), while this proceeding was still before me. Respondent's subsequent motion to dismiss the 8(a)(5) portion of the complaint is disposed of by my recommended Order herein.

2. Where they stand now

At the close of the hearing Respondent took the position that the issue posed by my ruling on June 27, 1974, on its original motion for summary judgment was still before me, citing the Board's failure to give any reasons for its decision in its telegram of September 11, 1974. With respect to the due process issues, its brief reads:

> It is clear that the record in the instant case compels a finding that the Respondent's dispatchers are and were, at all times material herein, persons properly excluded from the protections of the Act, thereby precluding findings that the Respondent violated Sections 8(a)(1), 8(a)(3), or 8(a)(5) as to its dispatchers.
>
> Admittedly, such a decision by the Administrative Law Judge would moot the presently blocked decision in the unit clarification proceeding (11-UC-15). However, at this juncture, the Respondent suggests, the Administrative Law Judge should be in no way reticent on that account.
>
> The Respondent, in spite of binding agreements to the contrary, has been forced to litigate its case not once but twice. The Respondent did everything in its power to avoid the second trial, pointing out to the Board time and again, the inequities and burden involved, as well as the potential conflict between a decision of the Administrative Law Judge and the blocked decision in 11-UC-15.
>
> "No matter," said the Board; "try it again. The Charging Party is not pleased with the record it made in the first trial. It seeks another forum, in spite of its agreement not to do so."
>
> * * * *
>
> The Respondent still believes that it has been, at all times, entitled to the decision which it sought in the unit clarification proceeding. Nevertheless, the Respondent will now join with the Board and the Charging Party in urging the Administrative Law Judge to dispose of the central issue in this entire case.
>
> Were the Respondent's dispatchers supervisors prior to September 26, 1973? The Respondent is confident that the record in this case shows overwhelmingly that they were.
>
> Although the Respondent earnestly maintains that the supervisory status of the dispatchers is dispositive of the Section 8(a)(5) allegations in the Complaint, the Respondent does not waive, and reasserts herein, the position taken in its Motion For Partial Summary Judgment (RX 5) denied at trial. Assuming, *arguendo*, that the Respondent did unilater-

ally convert its dispatchers from employee status to supervisor status, General Counsel has failed completely to show the source of any obligation on the Respondent to first bargain with the Charging Party about such an act.

I do not agree with counsel for Respondent that "such a decision by the Administrative Law Judge would moot the presently blocked decision in the unit clarification proceeding (11-UC-15)." Absent an agreemnt between Respondent and Local 391 that both parties have waived their rights under the August 24, 1973, settlement stipulation and that they will be bound on the unit question by the decision in this proceeding—and there is no evidence of any such agreement in this record—the end of this proceeding will merely unblock Case 11-UC-15. The unit question will not be resolved until a subsequent final decision issues in that case.

More importantly, in view of Respondent's belief "that it has been, at all times, entitled to the decision which it sought in the unit clarification proceeding," I do not read "the Respondent will now join with the Board and the Charging Party in urging the Administrative Law Judge to dispose of the central issue in this entire case" as a waiver by Respondent of its right to pursue the argument, before Board and courts, that it was denied due process when it was forced to defend itself in an unfair labor practice proceeding in order to have the unit question resolved rather than having it resolved in the unit clarification proceeding to which it and the Union had committed themselves. However, by its telegram of September 11, 1974, the Board has already ruled against Respondent on that issue. I am bound by that ruling. As to the Freedom of Information Act due process issue, I have received no posthearing renewal of the motion I denied on November 6, 1974. I find, therefore, that Respondent has been accorded due process at all stages of this proceeding.

B. *The Merits of the Dispute*

1. The supervisory issues

a. *Credibility*

There are no significant credibility conflicts in this record. Each side relied, in large part, on the testimony of dispatchers to establish the facts on which it relied. Dispatchers who obviously do not consider themselves supervisors (and presumably want to be represented by the Teamsters) testified for the General Counsel. The thrust of their testimony was that they possessed none of the statutory indicia of supervisory status, i.e., that they have never hired or fired another person and on through the whole litany of Section 2(11) of the Act, culminating in a picture of duties so routine as not to require the exercise of any independent judgment. Dispatchers who obviously do consider themselves supervisors (and presumably do not want to be represented by the Teamsters) testified for Respondent. The thrust of their testimony was that they, or others as to whom they had firsthand knowledge, had done some of the things listed disjunctively in Section 2(11), with emphasis on the nonroutine nature of their day-to-day duties. However, there are no significant points in the record at which a witness for one side testified that a hard fact—as distinguished from a conclusion—testified to by a witness for the other side was not so.

The simplest example contained in the record will suffice, I hope, to make this point clear. Respondent has two local dispatchers. Paul Orion Church testified for the General Counsel. James Robert (Bob) Merritt testified for Respondent. There is no evidence to refute Church's testimony that he was not told, at the time he became a local dispatcher, that he was a supervisor. There is no evidence to refute Merritt's testimony that he was. Both were obviously honest men doing their best to tell the

truth as they perceived it. I believe both of them. For whatever significance it has on the issue of whether local dispatchers are supervisors within the meaning of the Act—and obviously (once again), given the state of this record, it cannot be the point on which the whole issue turns—Merritt was told, Church was not.

So it goes throughout the myriad facts thrown into this record by both sides. From that mass of testimony, however, emerges a picture of the way Respondent's dispatchers go about handling their jobs each day which is essentially undisputed. Those are the facts I have attempted to set forth below. Since all witnesses agreed that the issuance of job descriptions on September 26, 1973, changed nothing about the way these men go about their jobs, these facts are as true today as they were in January 1973, the earliest period any witness gave as the start of union talk among Respondent's dispatchers, or on July 9, 1973, the day Respondent first took the position with the Union that its dispatchers were supervisors within the meaning of the Act, or on July 13, 1973, the day dispatchers did not join other terminal workers in a strike for recognition, or on August 24, 1973, the day Respondent and the Union agreed to let the Board decide the question in a unit clarification proceeding, or on September 26, 1973, itself.

b. *Respondent's system*

Respondent operates on the east coast with one terminal as far west as Cleveland. Its main office is located in Winston-Salem. The terminal at Kernersville opened in 1968. Kernersville is located some 10 miles east of Winston-Salem. The Kernersville terminal is 1 of 41 operated by Respondent.

Kernersville is Respondent's main break-bulk terminal. The only other break-bulk terminal is located in Jacksonville. Respondent's Florida operations are *sui generis*.

Jacksonville relays freight into and out of all of Florida. Florida drivers do not drive farther north than Jacksonville. Non-Florida drivers do not drive farther south than Jacksonville. Trailer loads of freight into or out of Florida which require their bulk to be broken because they are destined for more than one consignee have it broken at Jacksonville. Those which do not are subject, at a minimum, to a change in driver and tractor, for Respondent's Florida drivers are owner-operators. Other than Florida, however, Kernersville serves as the break-bulk terminal for all of Respondent's operations. As such, it is the center of the web of Respondent's system from Jacksonville north. Richmond is Respondent's only relay terminal other than Jacksonville.

Respondent underwent a systemwide strike by the Teamsters from February to August 1974. Prior to that strike, Respondent had some 700 over-the-road drivers domiciled at Kernersville. At the time of the hearing, because the volume of Respondent's business had not yet recovered from the effects of the strike, that number was down to approximately 450 with the balance still on layoff. During the summer of 1973, the crucial period in this proceeding, there were some 45 over-the-road drivers domiciled in terminals south of Kernersville and another 45 domiciled in Richmond. Drivers domiciled at terminals other than Kernersville are referred to, from the Kernersville point of view, as foreign drivers. Terminals other than Kernersville are foreign terminals.

Kernersville dispatchers are, and always have been, salaried. They do not, and never have, punched a time-clock. They participate in, and have always participated for those years when Respondent's profits were large enough to trigger profit sharing, Respondent's annual bonus plan. In these three respects they are now unlike employees in the terminal office unit and like admitted supervisors and managers. However, at the time of the August 24, 1973, settlement, these distinctions did not

clearly separate employees from supervisors within the meaning the Act. At that time freight inspectors were also salaried, did not punch a clock, and participated in the bonus plan. They were placed in the unit by agreement. They were subsequently converted to hourly status, required to punch a clock, and deprived of their bonus benefits. The latter represented no immediate real loss to freight inspectors. Because of its profit situation, Respondent paid no bonus in 1974 for 1973. As of the time of the hearing, Respondent's profit situation for 1974 was still an open question.

Respondent is a signatory to the National Master Freight Agreement and various local cartage agreements in each of the Teamsters jurisdictions in which it operates terminals, including Kernersville. The former controls its relationship with its over-the-road drivers. The latter controls its relationship with its local drivers. Over-the-road drivers are paid, basically, by the number of miles they drive. Local drivers are paid by the number of hours they work. Regulations promulgated by the United States Department of Transportation also loom large in the relationship of Respondent with its drivers.

The interplay of union contracts and DOT regulations creates a situation the complexities of which are beyond the scope of this decision, especially where over-the-road operations are concerned. This somewhat simplified explanation will, I think, be sufficient for an understanding of the relationship of contracts and regulations to the issues:

Drivers are forbidden to drive longer than 10 hours without rest or to be on duty for longer than 15 hours in any 24-hour period. Each driver must keep an accurate log of his driving and duty time to ensure compliance with this rule. When a driver has driven for 10 hours he is said to be out of hours. Log clerks, who are included in the terminal office employees unit, keep track

of drivers' hours. Drivers report to them when they return from trips. Drivers keep track of their own hours when they are on the road. When an over-the-road driver is dispatched from his domicile, he may drive up to four full 10-hour periods before returning to his domicile without Respondent incurring any obligation to compensate him for time when he is not driving or otherwise on duty. When a driver is on a trip and not driving or otherwise working, he is said to have been put to bed. On a maximum, four-leg trip, Respondent may put its drivers to bed for as little as 8 and as many as 13 hours after the first leg and must put them to bed for 8 hours, no more, no less, after the second and the third legs. If it keeps them on the road longer than four legs, it must compensate them on a time basis for each subsequent rest period. Whether the drivers are alone (single operation) or working as a team of two in a tractor which has a bunk for the off-duty or out-of-hours driver (double operation), the application of these facts is the same. The only important difference between single and double operations is that the truck can keep working, thus increasing Respondent's revenue, although an individual driver cannot.

Drivers are dispatched from any terminal, whether their domicile or one to which they have driven in the course of a multilegged trip, on a first-in first-out basis. In the event the first-in first-out principle is violated, whether intentionally or unintentionally, the driver who has been bypassed is said to have been run around. A driver who has been run around is entitled to penalty pay. Drivers are also entitled to compensation on a time basis for waiting; e.g., delays which occur when they have to wait at a consignee's premises before unloading or delays which occur when their rest period is up at a terminal other than their domicile and the terminal has no trailer ready for them to pull. By the same token, they are entitled to delay pay at their domicile when

they report for a trip as ordered and the load for which they have been summoned is, for any reason, not ready to go.

There are three categories of dispatchers at Kernersville, central, line-haul (or over-the-road), and local. To dispatch is to control the flow of trailers by controlling the comings and goings of drivers. The line-haul and local dispatch functions are performed at each of Respondent's 41 terminals, for each terminal must control the comings and goings of both over-the-road and local drivers at that terminal. At some terminals the functions are combined in the same dispatcher. At some they are performed by a person or persons who have additional duties and titles other than dispatcher. At Kernersville, they are performed by separate categories of employees called linehaul dispatchers and local dispatchers. The central dispatch function is unique to Kernersville. Central dispatchers are found only there in Respondent's system.

c. *Central dispatchers*

(1) Facts

Respondent's nine central dispatchers are responsible for moving freight in the manner which will maximize profits. They work three 12-hour shifts and one 6-hour shift each week. Two of them are on duty at any given moment. Together, they man the central dispatch office around the clock and around the year. They are supervised by Joe Scott, Respondent's director of central dispatch.

The central dispatch office is a large room adjacent to the line-haul dispatch office. Its distinctive feature is the boards which line its walls, 1 for each of Respondent's 41 terminals. Each board contains 12 horizontal lines. Each line is actually a slot in which pieces of plastic

measuring approximately 3 by 6.5 inches can be placed. Each piece of plastic bears a number corresponding to a trailer and is known as a trailer backing. Each contains a pocket in which a 3- by 5-inch card can be inserted. When a trailer backing is placed in the bottom line of a terminal's board, it indicates that the trailer is en route to that terminal. When it is placed in the line next above the bottom line, it indicates that the trailer is at the terminal, waiting to be unloaded, and so on up the board. Each line indicates the status of the trailer at any given moment. The fourth line from the bottom, for example, indicates that the trailer is empty, ready to be loaded. Central dispatchers move the trailer backing from line to line as the trailer's status changes. When the trailer is dispatched, the trailer backing is moved to the bottom line of the terminal which is the trailer's destination or, in the case where the trailer is headed directly to a consignee's premises, which has jurisdiction over the area. When a tractor is attached to a trailer, a small plastic tab bearing the number of the tractor is attached to the trailer backing.

The cards which are inserted in the trailer backings contain information about the freight which is on the trailer. When trailers are loaded at Kernersville, the cards are filled out in the warehouse. When the trailer is loaded at some other terminal, the information is sent to central dispatch from the terminal.

Central dispatch is linked to terminals other than Kernersville by teletype and telephone. Central dispatchers wear telephone headsets and spend a major part of their time in telephone communications with either terminals or drivers. For example, the driver trip card which is given to each driver when he is dispatched contains printed instructions that he is to call central dispatch in the event he is delayed for more than 1 hour, for it is essential to Respondent's system that central

dispatch know where every trailer is at every moment of the day or night. The two central dispatchers who are on duty at any given time split the work geographically. One handles operations north of Kernersville; the other operations, south.

Only a few of Respondent's terminals other than Kernersville are open around the clock. This puts a special burden on central dispatch at night and over weekends. It also generates the requirement for two detailed reports which each terminal must forward to central dispatch each day, either by teletype or telephone. By 8 a.m. each working day each terminal must give central dispatch a complete rundown on the state of its yard. The central dispatchers on duty at that hour utilize that report to make sure that each terminal's board accurately reflects what is happening in that terminal at that hour. As each terminal closes, it sends its final report to central dispatch. This is, essentially, the same as the 8 a.m. report and is used for the same purpose. In addition, it tells central dispatch what loaded trailers are sitting in the yard waiting to be pulled away by drivers who arrive during the night or over the weekend so that central dispatch can do for the terminal what its own line-haul dispatcher does during the day; i.e., dispatch the driver on the next leg of his trip. The final report sometimes lists all trailers ready for dispatch in the order in which they should leave the terminal. More often, it lists only the two or three with top priority and leaves the remainder up to the discretion of the central dispatcher on duty when the driver calls for instructions. In addition to these two full reports, terminals are in constant contact with central dispatch each day, reporting when loads are dispatched to terminals other than Kernersville and working with central dispatch on problems such as their needs for special equipment like refrigerated trailers or extra equipment not immediately available from Respondent's own pool. In the latter event,

they must first obtain the permission of the central dispatcher on duty before they can rent either trailers or tractors, for only he knows whether other terminals have unused equipment and can make the necessary judgment as to whether paying rent or driving empty miles (the term used to describe the movement of empty trailers or bobtailed tractors) is the more economical solution to whatever problem has arisen.

Weekends create another special situation in Respondent's operations. Ideally, each terminal would have one full trailer load of outbound freight for each full trailer load inbound. Then each driver who hauled a full trailer in could drop it, hitch his tractor to another full trailer, and, as soon as his hours permitted, haul it away without getting paid for any waiting time. The real world, however, is somewhat less than ideal. When more tractors arrive at a terminal than are required to haul outbound freight away, the terminal is said to be overrun. The result is extra expenses charged to the terminal's account which are an anathema to terminal managers since their bonus depends not only on Respondent showing a profit in its systemwide operations but also at their particular terminal. In the past the overrun problem has been especially acute in the early days of the week because of inbound freight that arrives while terminals are closed for the weekend. As a result a company policy has been established that each terminal will coordinate with central dispatch at the end of the week as to the number of trailers which will be sent to it over the weekend and through the following Tuesday. The terminal manager tells central dispatch how many loads he can efficiently receive, given the personnel he will have available for unloading, and his needs for trailers for outbound freight on the Monday and Tuesday upcoming. Central dispatch pledges its best efforts to send him that much freight and no more. From Wednesday through Friday there is no limit on the number of trailers cen-

tral dispatch can send into any terminal. The limitations imposed by the weekend policy, however, are not hard and fast restrictions on central dispatch's authority. It can overrun terminals on weekends and frequently does when the economics of the situation dictate. An example of such a situation is the development of loads of priority freight, known in Respondent's parlance as RX loads, for a terminal after the weekend deal has been made. Overrunning of terminals was particularly common following the end of the strike in August 1974 when Respondent was struggling to get its business back to its prestrike level.

Respondent also has on duty at all times at the Kernersville terminal an official known as a driver supervisor. Driver supervisors are admittedly supervisors within the meaning of the Act. Their office is in the vicinity of central dispatch. They are supervised by Joseph Marsh, Respondent's director of driver personnel. Their job is to assist Marsh in supervising over-the-road drivers. For instance, the driver supervisor who is on duty when a driver returns to Kernersville from a trip checks the driver's trip card in order to initiate the paperwork required to get the driver paid what he has earned on the trip. If necessary, driver supervisors also look at the driver's tachograph, a device which keeps a running record of time, speed, and other data as a truck is operated. They also handle driver reprimands and, in their early stages, grievances. Having a driver supervisor on duty 24 hours a day postdates the opening of the Kernersville terminal. Prior to March 3, 1970, driver supervisors were on duty only during the day.

Deciding which load to pull first out of a closed terminal, deciding whether to permit terminals to rent equipment instead of logging empty miles, and deciding whether to overrun terminals are three examples of the judgments which central dispatchers must make in their

day-to-day efforts to move freight efficiently. Each affects the driver involved. When a central dispatcher tells a driver who calls from a closed terminal that he should take trailer A rather than trailer B, he is deciding that the driver will be compensated for the number of miles to trailer "A's destination rather than the number of miles to trailer B's destination. When a central dispatcher tells a terminal not to rent the trailer it needs because he will send it an empty trailer from another terminal nearby, he is deciding that the driver who pulls the empty trailer will be compensated for the number of miles between the two terminals. When a central dispatcher decides that a terminal will be overrun, he is deciding that the drivers who exceed the terminal's immediate need will have to be compensated for some waiting time before they can be dispatched again. Many other decisions that central dispatchers make daily affect over-the-road drivers.

If a driver is at a terminal where there is a load ready to be hauled but the central dispatcher knows that an RX load will shortly be coming out of that terminal and no other driver will be immediately available for it, he will balance the cost of having the driver wait against the cost of having the RX load delayed. This situation may arise as a result of a call from a driver who has arrived at a closed terminal or it may arise when a terminal is open and the central dispatcher calls the terminal's over-the-road dispatcher with instructions about the RX load. If the central dispatcher elects to have the driver wait for the RX load, the driver, if he cannot be put to bed until the RX load is ready, will be compensated for waiting time.

An analogous situation arises when there are two drivers available to pull a particular load. Under the first-in first-out principle, the load belongs to driver A. Sometimes, for economic reasons, the central dispatcher will

deliberately run around driver A and give the load to driver B. Driver A then collects runaround pay.

Eighty-five percent of Respondent's over-the-road dispatchers are terminal to terminal. On those occasions where the dispatcher is terminal to consignee, the explanation is usually that the delivery point is beyond the radius around the nearest terminal which Respondent's contract with the Teamsters delineates as the local delivery area. Occasionally, however, the delivery point is within a local delivery area. This calls for a penalty to be paid to the terminal's local drivers who have lost the work. In situations analogous to deliberate decisions to incur runaround pay, central dispatchers sometimes decide, for economic reasons, to order over-the-road drivers to make deliveries to consignees within local delivery areas, the penalty notwithstanding.

Delivering directly to consignees creates a couple of other situations which can affect a driver's pay. Drivers sometimes call in and report that they cannot begin unloading immediately, either because the consignee is not open or because the dock is blocked. The central dispatcher then must weigh the cost of having the driver go on waiting time for the estimated period against the cost of having the load taken on to the nearest terminal for later delivery. If he decides that having the driver wait is the better choice, the driver goes on waiting time.

Except where Respondent's contract with its customer provides otherwise, over-the-road drivers unload their trucks at the consignee's premises. Sometimes, for various reasons, they are reluctant to do so and call central dispatch for permission to hire casual labor to assist them. Once again, the central dispatcher weighs the economics of the situation. If he grants permission, the driver decreases his waiting time and gets back on the road that much sooner. If the central dispatcher turns down the request, the nondriving time for which the driver is compensated is extended.

Some freight, such as cigarettes, which Respondent carries are known as security loads. Company policy is never to leave a security load unattended. When a driver who has arrived with a security load calls in from a closed terminal or from the premises of a closed consignee who does his own unloading, the central dispatcher instructs him to stay with the trailer until the terminal or the consignee opens. The driver is compensated for waiting time.

Drivers who are anxious to maximize their earnings will sometimes call in while on the road and offer to give a central dispatcher all their breaks. This is slang for agreeing not to claim compensation for fourth and subsequent rest periods in a particular dispatch if the dispatcher will keep them out beyond four driving periods, Since driving pays more than waiting and since finishing a trip means going back to the bottom of the available drivers' board to wait for another dispatch on the first-in first-out principle, giving all his breaks to the dispatcher can greatly enhance the income of a driver who is not anxious to get home. If there are loads available which make it to Respondent's economic advantage to keep the driver on the road and if the central dispatcher thinks that he can trust the driver who has made the offer, he accepts all the driver's breaks. The driver profits accordingly.

Other decisions which central dispatchers make on a daily basis as a result of calls from drivers affect the routes they drive and the time they work. States limit by law the weight which tractor-trailers can haul on their highways. Respondent's policy is to abide by those laws. Sometimes, however, violations are unavoidable as, for example, where the load, such as a single piece of machinery which weighs more than the law allows, is indivisible. Overweight loads which originate in Kernersville are a problem for line-haul dispatchers. However, overweight

loads which originate at other terminals sometimes become problems for central dispatchers. For example, a driver is told, on leaving a foreign terminal, to check his weight at the first fuel stop he comes to. He does and finds he is overweight. He calls central dispatch. The central dispatcher then instructs the driver, to the extent that he is able, what deviation to make from his assigned route to avoid known official weighing stations.

The routes which Respondent requires its drivers to drive on avoid, in the main, toll roads as a way of reducing expenses. Sometimes a driver who calls central dispatch because he has been delayed is instructed to run all toll roads because the greater speed which can be maintained may still permit the freight to arrive at its destination on time. Sometimes a driver will request permission to run all toll roads for his own purposes. Whether the central dispatcher grants or denies his request depends, once again, on the economic consequences to Respondent.

Drivers also sometimes ask for permission to deviate from their assigned routes for personal reasons having nothing to do with toll roads. Ideally, each leg of a trip which an over-the-road driver is dispatched on can be driven in the 10 hours which a driver can be behind the wheel without resting. Thus, ideally, he can be put to bed at a terminal. Terminals which have no bunkhouses have arrangements with neighboring motels and, on jumps which cannot be driven in 10 hours. Respondent has arrangements with appropriately located motels along the way where drivers are instructed to go to bed. Drivers sometimes call into central dispatch and ask permission to deviate from their assigned route and/or to cut their driving time a little short and/or to extend their rest period a few hours so that, for example, they can spend some time with relatives. The *quid pro quo* implied in these requests is that they will be resting at a

place which involves no motel bill for Respondent and/or that they will not claim waiting pay for the additional rest hours. Whether the central dispatcher grants or denies permission depends, once again, on the economics of the situation. If Respondent saves money and if the freight will not be delayed unduly, he frequently permits the driver to vary route and/or schedule as the driver wishes. If, on the other hand, the central dispatcher denies permission, the driver goes off on a frolic of his own at his peril. The peril is real, for deviations from his orders cannot be erased from the tachograph which the driver turns in to the driver supervisor at the end of his trip.

Central dispatchers have a money relationship with over-the-road drivers which is even more immediate than the pay consequences detailed above. When a driver on the road needs cash he calls central dispatch and the dispatcher, in appropriate circumstances, sends it to him. Usually, this is accomplished by the central dispatcher authorizing a truck stop with which Respondent has an ongoing relationship to give cash to the driver and reimbursing the truck stop by filling out a purchase order form and sending it through Respondent's bill-paying system. On other occasions, the central dispatcher wires money. The former system usually covers the situation where a driver has run out of funds while on the road and needs eating or toll money. The latter occasionally (and rarely) comes into play when a driver is arrested for speeding or is caught in an overweight truck. State police hold driver and/or truck until some arrangement is made for paying the fine. Sometimes, apparently in locations where Respondent has an ongoing relationship with the police, they settle for an assurance from the central dispatcher that the fine is on its way. The central dispatcher then uses the purchase order technique. Sometimes the police refuse to release truck and/or

driver until they have money in hand. The central dispatcher then uses the direct wire technique.

Other situations in which drivers are in contact with central dispatchers do not involve routes, time, or the driver's money. Drivers do not break seals on trailers without first getting central dispatch's permission. These calls come in when a driver has a shifting or leaking load. Whether the central dispatcher grants or withholds permission depends on how serious the situation is. Generally, he grants it since the driver on the spot is in a better position to appreciate what has happened than a central dispatcher at the other end of a long-distance telephone call.

Drivers do not extend credit to consignees without first getting central dispatch's permission. This situation occasionally arises when an over-the-road driver is delivering a C.O.D. shipment directly to a consignee and the consignee has no money available. The central dispatcher must then choose between the alternatives of dropping the freight without receiving payment or instructing the driver to carry the freight to the nearest terminal and let it solve the problem.

Drivers do not cross picket lines at places where they are supposed to make deliveries because their union contract says they do not have to. When a central dispatcher gets a call from a driver in that situation, he must figure out where to tell the driver to drop the freight.

Finally, there is the situation which arises when an over-the-road driver refuses to carry out an order given to him by a central dispatcher. The dispatcher is under instructions to tell the driver to catch the bus, i.e., leave the truck and return immediately to his domicile terminal. (In recent years catch the bus has become catch the plane, but the principle remains the same.) The

situation does not occur often. (It occurred more frequently prior to the current contract with the Union than it does now when central dispatchers ordered inbound drivers anxious to get home to turn back up the road. The present contract, executed in 1973, provides for penalty pay in that situation.) On most of the occasions when such a confrontation has developed between a driver and a central dispatcher, the driver has backed down and done what he was told. On those rare occasions when the driver has actually caught the bus, he has been discharged or otherwise disciplined only after an independent investigation by the director of driver personnel and/or his assistants.

The above list by no means exhausts the situations in which drivers are in contact with and receive instructions from central dispatchers.

(2) Analysis and conclusions

Since the General Counsel has the burden of proof, he has the unenviable task of proving a negative; i.e., that Respondent's dispatchers do not meet any of the indicia of supervisory status set forth in Section 2(11) of the Act in their relationship with any of Respondent's employees. His burden is the same with respect to each of the three categories of dispatchers involved in this proceeding and his position is, in broad outline, also the same as to each. Reduced to the oversimplicity of one sentence, it is that they do not possess and have not exercised any of the powers enumerated in Section 2(11) and that the day-to-day exercise of their duties is so routinized that it does not rise to the level of an exercise of independent judgment. Respondent's broad position is, of course, the opposite. With respect to central dispatchers, it contends that they supervise over-the-road drivers.

The two principal prongs of the General Counsel's argument that dispatchers carry out only routine duties

are the fact that Respondent has laid down guidelines for them, principally in the form of interoffice correspondence, and, in the case of central and line-haul dispatchers, the fact that driver supervisors are on duty 24 hours a day. General Counsel's Exhibit 34 is a good example of interoffice correspondence. It was directed to "Central Dispatch" by J. M. Newell, Respondent's then director of central dispatch, on March 13, 1973, with copies to J. M. Bumgarner, vice president in charge of operations, D. E. Ray, director of safety and security, and J. H. Marsh, director of driver personnel. It reads:

> Re: Road Driver Advances
>
> Policy has been established not to give road drivers advances prior to leaving Kernersville by the Driver Supervisors. Investigation reveals drivers are getting up the road a few miles and calling for and getting advances from Central Dispatch. This practice is to be ceased immediately.
>
> Advances are to be issued only to pay fines or in extreme emergencies, or if a driver has been out several days and is staying out and needs money for tolls, etc. All other request are to be referred to the driver supervisor on duty.

The items of interoffice correspondence (as well as similar documents such as portions of Respondent's manual) which are in evidence vary as to the explicitness of the policies they lay down or the stringency with which they indicate the various policies are to be followed. None, however, so limits the authority of central dispatchers in carrying out those policies that they are ordered to deal with every situation precisely as Respondent has instructed. The thrust of each is similar to the thrust of General Counsel's Exhibit 34. Central dispatchers must still use independent judgment in applying Respondent's overall policies to particular situations as they arise.

The General Counsel contends that central dispatchers do not supervise over-the-road drivers because driver supervisors do. Since driver supervisors are always on duty, his argument runs, any decisions of a supervisory nature made or actions taken are the decisions or actions of the driver supervisor and not the central dispatcher on duty at the time. Underlying this argument is the distinction between the central dispatcher's responsibility for the freight to be moved and the driver supervisor's responsibility for the driver who moves it. The distinction is a valid one. The central dispatcher's primary concern is for the freight. The driver supervisor's primary concern is that drivers drive right. The irreconcilable difference between the points of view of dispatchers who testified for the General Counsel and those who testified for Respondent is bottomed on this distinction. Dispatchers who saw themselves as employees emphasized the relationship between themselves and the driver supervisor who worked on their shift. The picture they tried to paint was one of bucking supervisory decisions to the driver supervisor and abiding by his decision. Dispatchers, present and former, who saw themselves as supervisors deemphasized that relationship. Even the former, however, testified in sufficient detail about their roles in specific situations or incidents to place the relationship between central dispatchers and driver supervisors beyond dispute. Central dispatchers do, on occasion, refer drivers' calls to driver supervisors and abide by what they decide. But on other occasions they do not. And the picture which emerges from the record as a whole is one of a cooperative relationship between two supervisors with two different responsibilities. If, on those occasions when they both get involved, the driver supervisor's decision can be implemented without delaying the freight or incurring undue expense, the central dispatcher goes along with it. If not, he does not. In fact, the driver supervisor's first loyalty is also to Respondent. There-

fore, seldom does a situation arise in which a driver supervisor and a central dispatcher disagree as to how a driver's request should be answered. When, for example, a driver supervisor tells a central dispatcher to let a driver deviate from his route so that he can visit his family, the driver supervisor does not talk in terms of an order but in terms of a suggestion, either explicit or implicit, that the driver should be accommodated if it will make no difference in delivery of the freight the driver is hauling, a subject about which the driver supervisor has no knowledge. When the central dispatcher, who knows about the freight, decides that a deviation will make a difference, the answer is no. That is the answer the driver gets, the driver supervisor's suggestion to the contrary notwithstanding.

The valid distinction between the role of driver supervisors and the role of central dispatchers underlies the General Counsel's citation of *The Baltimore Transit Company*, 92 NLRB 1260 (1951), for the proposition that an individual is not a supervisor when he controls the movement of equipment and direction of personnel is only an incidental result. In *Baltimore Transit*, the persons found to be employees and not supervisors were radio dispatchers. The Board said (at 1264):

> In all these instances [of situations where the radio dispatchers received calls about transit company vehicles in distress and took steps to solve the problems], it is the contention of the Employers, the radio dispatchers direct the activities of other personnel by the use of discretionary action. We do not agree. The record shows that the great majority of the calls received by the radio dispatchers involve incidents for which there is a settled and specified procedure to be followed.
>
> The dispatcher, in most instances, merely relays information to a mobile supervisor who proceeds to

> the location of the trouble and assumes charge. In instances where immediate advice is required by the operator, the dispatcher follows the routine procedure indicated by his instructions. The evidence is conflicting on the question as to whether the dispatcher, on his own initiative, may send equipment out to replace or supplement vehicles in regular operation. In any event, the type of direction here supplied by the radio dispatcher is concerned primarily with equipment rather than personnel. We have previously held that where the direction and control exerted by the individual is over the movement of equipment and the direction of personnel occurs only as an incidental result, the statutory definition of "supervisor" does not apply. Accordingly, we find that the Employers' radio dispatchers are not supervisors as defined in Section 2(11) of the amended Act, and, upon the entire record, we find that the dispatchers have a sufficient community of interest with other clerical employees to be included in the existing bargaining unit. [Footnotes omitted.]

The distinctions between *Baltimore Transit* and this proceeding require the conclusion that Respondent's central dispatchers are supervisors within the meaning of the Act.

Since Section 2(11) is written and has been consistently interpreted disjunctively, the last of the many authorities of central dispatchers set forth in the section entitled "Facts" just above is enough to support that conclusion. The General Counsel litigated catch-the-bus situations as if they were an exercise of a power to discharge. The evidence in this area clearly will not support that conclusion because discharge or other discipline only followed an independent investigation by higher level supervisors. But there can be no doubt that central dispatchers have, and have exercised, the authority to suspend drivers who have refused to follow their instructions,

pending independent investigation of whether the drivers should be discharged. The fact that the power is exercised infrequently does not make it any the less real. The fact that drivers usually back down rather than have the central dispatchers follow through with their threats to suspend them does not make the exercise of the power merely sporadic. The fact that investigation by others follows suspension does not make the suspension any less effective when it is imposed. Authority, "in the interest of the employer, to . . . suspend . . . other employees" is one of the specific indicia of supervisory status set forth in Section 2(11).

But Respondent's central dispatchers are distinguished from The Baltimore Transit Company's radio dispatchers in many other respects. Central dispatchers use independent judgment all day long in making decisions which affect the wages, hours, and working conditions of over-the-road drivers. Their direction of personnel is not merely incidental to their direction of equipment. Direction of drivers lies at the very heart of their carrying out the jobs they have been hired to do, overseeing the movement of freight in the most economical manner possible. I conclude, therefore, on the basis of the record as a whole, that central dispatchers also responsibly direct over-the-road drivers within the meaning of Section 2(11).

d. *Line-haul dispatchers*

(1) Facts

Respondent's line-haul dispatchers are responsible for sending over-the-road drivers on their way from the Kernersville terminal and checking them in when they return. Four are a full complement although, at the time of the hearing, there were only three on the payroll. Lonnie Booe, Respondent's supervisor of road dispatch, was himself pulling a full tour of duty as a dis-

patcher in order to cover the job. (Booe's immediate supervisor is the director of central dispatch. There is no level of supervision between the latter and central dispatchers.) There are also four dispatch clerks. One dispatcher and one dispatch clerk are on duty at the same time. Their shifts are the same as those of central dispatchers. Like central dispatch, the line-haul dispatch office is never closed.

The dispatch procedure begins when the warehouse finishes loading the trailer. The trailer card is placed in the trailer backing and sent to central dispatch along with the bills of lading for the freight on the trailer. Central dispatch usually marks a departure time on the card before handing card, backing, and bills to line-haul dispatch. The time of dispatch is based on a schedule of running times from Kernersville to the various points to which trucks are sent and is computed by subtracting running time from the hour central dispatch wants the truck to reach its destination. If central dispatch places no time of dispatch on the card, line-haul dispatch decides what time the trailer will be sent on its way.

In any event, card, backing, and bills go from central dispatch to line-haul haul [sic] dispatch. Cards and backings are placed in a rack at the dispatch clerk's desk next to various boards which indicate the availability of drivers. One of the dispatch clerk's principal tasks is to summon drivers to work by telephone under the first-in first-out principle as they rise to the top of the list so that each trailer can leave at its appointed time. The dispatch clerk's other major task is to prepare the driver's trip card by typing on it all the instructions, such as where he is going, what he is to do when he gets there, which fuel stops he is to use, and the like, which the driver needs for the trip he is being dispatched on. Dispatch clerks were originally lumped in with dispatchers in Respondent's and the Union's dispute over unit. However, the

problem was resolved at the hearing when all parties stipulated that dispatch clerks are rank-and-file employees. (Dispatch clerks are hourly paid, punch a timeclock, and do not participate in the bonus plan.)

The line-haul dispatcher's principal tasks are to get tractors hooked up to the trailers that are ready for dispatch, weigh them, check the trip card prepared by the clerk, and punch the drivers out when driver, tractor, and trailer are all ready to go. Punching drivers out and manning the window are roughly synonymous phrases in Respondent's parlance. Both simply mean that the dispatcher sits at a window in the line-haul dispatch office, marks the time of departure on the driver's trip card, and hands him his trip card, bills of lading, and any other material, such as interterminal correspondence or payrolls, which he is to take with him. Punched out, the driver leaves Kernersville. A tractor tab is placed on the trailer's card and backing, and all three are handed back to central dispatch to be placed in the en route line of the appropriate terminal's board.

Manning the window on the one hand and manning the telephone and the typewriter on the other are the basic difference between the line-haul dispatcher's and the dispatch clerk's jobs. However, in practice, the distinction is less than sharp, for dispatcher and clerk work as a team in doing whatever has to be done to get the job done. When a lot of drivers have to be rounded up at one time, the dispatcher pitches in with the clerk to make telephone calls. When a lot of drivers are lined up waiting for their orders, the clerk mans another of the three windows which open into the line-haul dispatch office and punches them out. When either one is on break, the other does whatever has to be done at the time.

When an inbound load of freight arrives at Kernersville, the driver punches in at the line-haul dispatch office. He leaves the bills of lading for the freight on the trailer and any other items such as interterminal correspondence he may be carrying. The dispatcher (or the clerk, if he happens to be manning the window at the time) marks the time of arrival on the driver's trip card and returns it to him. The driver turns it in to the driver supervisor. Meanwhile, the dispatcher retrieves the trailer backing from the inbound line of the Kernersville board in the central dispatch office, removes the tractor tab, bundles card and backing with the bills of lading, and sends them to the warehouse.

Yard drivers known as switchers hook up tractors to trailers. In carrying out his responsibility to get trailers hooked to tractors, the line-haul dispatcher determines, by going into the yard and making a visual check, what tractors are on the power ready line. He then decides which tractor is to be used to haul each trailer. In making that decision he takes into consideration such things as whether to use single operation or double, what States the tractor carries licenses for, the size of the tractor, and the like. He then issues orders to switchers to hook a particular tractor to each trailer in time for departure from Kernersville at the hour specified by central dispatch or selected by line-haul dispatch. Once the hookup is made, the switcher drives across the scale just outside the line-haul dispatch office. Dispatcher or clerk weighs the rig, and the switcher takes it on to the tractor-trailer ready line where the over-the-road driver picks it up.

Switchers also work around the warehouse, backing trailers up to the dock to be loaded and then pulling them away. When the line-haul dispatcher has more hookups than the switchers assigned to that operation can handle, he seeks help from the shift-operations supervisor who is in charge of warehouse and dock work. If the shift-operations supervisor cannot meet his needs by sending him switchers from the dock area, the line-haul dispatcher seeks out over-the-road drivers who are waiting for their names to rise to the top of the board and who want to

earn extra money by working as switchers. Line-haul dispatchers also, on occasion, do favors for over-the-road drivers who do not want to be sent on the road by assigning them as extra switchers under these circumstances. If they are not assigned to switching work and fail to respond when called, over-the-road drivers get a warning letter for the first missed trip and a week's suspension for the second.

The weighing part of the hookup operation also, on occasion, requires the line-haul dispatcher to exercise his judgment. If a load is grossly overweight, he notifies the warehouse and sends the trailer back to the dock to have some freight pulled off. If the violation is not in the gross weight but in the weight on an axle, the form in which state laws are sometimes written, he attempts to correct the problem by slipping the tandem, an adjustment which can be made on some tractors and which will shift the weight of the load. If the problem cannot be corrected and the trailer must be dispatched in an overloaded condition, the line-haul dispatcher faces the same problem as the central dispatcher who receives a call from a driver who has just left a foreign terminal and weighed his rig at a fuel stop. He solves it in the same way, by including in the instructions he puts on the over-the-road driver's trip card a route which deviates from the one in the route book issued to drivers in order to avoid known official scales.

When an over-the-road driver rises to the top of the board and receives a telephone call from the line-haul dispatch office, he has 2 hours in which to report. Respondent has no rule covering the situation where a driver shows up more than 2 hours after he is called. Its contract with the Union implies that the driver misses the run and goes to the bottom of the board no matter how minor his dereliction. Line-haul dispatchers exercise their discretion. If the driver arrives within what strikes

the dispatcher as a reasonable period of time and no harm has been done, he is permitted to take the trip. If, for instance, the load for which he has been summoned is RX, the period which the dispatcher deems reasonable has a shorter duration. The dispatcher may then assign the RX load to the next driver on the list, assuming he has also been summoned and has arrived at the dispatch office, and let the late driver take the nonpriority load for which the second driver had been called. If the result of the driver's failure to abide by the 2-hour rule is that he has missed his run completely, the line-haul dispatcher moves his name to the bottom of the board and sends him to the driver supervisor. The penalties for mising runs are those already noted.

The relationship between line-haul dispatchers and the driver supervisors on their shifts is much the same as the relationship between central dispatchers and driver supervisors. When drivers with hours are in short supply, the driver supervisor works with the line-haul dispatcher and the dispatch clerk in trying to round some up. This usually is a matter of contacting drivers who have marked off, i.e., who have taken themselves off the available drivers board pursuant to the union contract, and persuading them to accept a run. They also cooperate when a driver shows up for work unfit to drive. While the problem has arisen only rarely, line-haul dispatchers have the authority to, and have, refused to dispatch drivers on the ground they appear to be drunk. When that happens, they turn the driver over to the driver supervisor so that he can be taken to a hospital for a breathalyzer test.

Other ways in which line-haul dispatchers exercise their judgment and affect the wages, hours, and working conditions of over-the-road drivers are similar to central dispatchers. They sometimes deliberately run around one driver to give a particular load to another. They sometimes order drivers to run all toll routes. They some-

times order drivers to turn on the yard, i.e., go out again as soon as they reach Kernersville, a situation analogous to a central dispatcher turning an inbound driver back up the road. They sometimes cause a driver to receive waiting pay by not having his rig ready to go at the hour he has been ordered to report.

(2) Analysis and conclusions

Respondent contends that line-haul dispatchers supervise dispatch clerks as well as over-the-road drivers. There is no merit to the first half of this argument, at least in the period prior to August 24, 1973. (As to effect of the promulgation of the line-haul dispatchers' job description on September 26, 1973, see the section entitled "The motive issue" below.) There is no evidence that a line-haul dispatcher ever hired or fired a dispatch clerk or did any of the other supervisory things enumerated in Section 2(11) with respect to them before the dispute which underlies this proceeding began. As to their day-to-day relationship, the way they work together as a team makes it more that of a journeyman to his helper than a supervisor to an employee under his control. (In fact, the line of progression in the dispatch operation is dispatch clerk to line-haul dispatcher to central dispatcher with each move considered a promotion.)

With respect to over-the-road drivers, however, Respondent is, I think, correct. While the question is a much closer one than in the case of the central dispatchers, I find, for the reasons already set forth above in their case, that line-haul dispatchers are supervisors within the meaning of the Act because they have authority responsibly to direct over-the-road drivers and their exercise of that authority is not of a merely routine or clerical nature but requires the use of independent judgment. Cf. *Spector Freight System, Inc.*, 216 NLRB No. 89 (1975); see cases cited therein, especially *Quality Transport Inc.*, 211 NLRB 198 (1974).

e. *Local dispatchers*

(1) Facts

Local dispatch at Kernersville is wholly separate from the integrated central and line-haul dispatch operation. It does not function around the clock. The official of Respondent directly over local dispatchers and local drivers is the terminal manager. The terminal manager has no responsibility for Kernersville's break-bulk, central dispatch, or line-haul dispatch operations. Respondent's director of central dispatch, supervisor of road dispatch, and driver supervisors have no responsibility for local operations.

Respondent's two local dispatchers are responsible for moving local freight, i.e., freight that must be delivered or picked up within a 50-mile radius of Kernersville, in and out of the terminal. They work a 5-day week. One comes in early in the morning, usually around 6 a.m., and leaves in midafternoon. The other comes in midmorning and leaves when local operations are over for the day, usually between 7 and 8 p.m. The latter man does not always wait for the last local driver to check in although that is the general pattern. They are supervised by M. Gerald Malone, Respondent's terminal manager. Malone is supervised by Respondent's director of transportation, the highest official actually headquartered at Kernersville.

There are 48 local drivers. Such North Carolina cities as Winston-Salem, Greensboro, and High Point fall within a circle with a 50-mile radius drawn around Kernersville. Local drivers bid each year, by seniority, for specific areas such as the Winston-Salem run or the Greensboro run. Others, lower down on the seniority list and known as wild card drivers, bid for hours. Generally, drivers are assigned work by local dispatchers in the area or according to the hours they have bid. However,

local dispatchers can, and do, send area bid drivers in other directions when there is no work in their own area and vary the hours of time bid drivers, within certain limitations, if the situation requires it.

Respondent regularly supplements its staff of local drivers by using casual drivers. These are divided into two categories, preferential casuals and casual casuals or moonlighters. The contract between Respondent and the Union provides, generally, that its terms apply to the first group. For example, they are called into work when and as needed by seniority. Casual casuals are covered only to the extent that they are paid at the rate specified in the contract. A driver is placed in either group only after he has been cleared by Respondent's personnel and safety and security departments. On any given day, local dispatchers decide if casual drivers are needed and, if so, how many will be called in. In the case of casual casuals they decide which men will be used, usually, although not always, on the basis of the men's familiarity with the area in which additional help is needed. At the time of the hearing, few casual drivers had been used since the end of the 1974 strike because of the depressed state of Respondent's business.

The labor contract also refers to peddle drivers, a subgrouping within the local drivers category. A peddle run is distinguished from a nonpeddle run by the distance to the farthest outbound point. Peddle drivers leave the terminal with freight to be delivered. They only make pickups on their way back. On nonpeddle runs, the local driver delivers and picks up freight indiscriminately. He may, in fact, leave the terminal towing an empty trailer in order to make a pickup.

Local dispatch begins the day with loaded trailers containing freight to be delivered. In addition, it has orders to pick up freight from various customers that day. The local dispatchers punch local drivers out, generally

in the morning, to deliver and pick up freight according to the terms of the bid system. Drivers keep in touch with the terminal during the day. Local dispatchers also instruct them to pick up any freight which is generated and is to be picked up that day. Local dispatchers punch the drivers in when they return in the evening. Since local drivers are paid by the hour and not by the mile, all of their compensation is computed on the basis of this record of the time they have worked. When they return to the terminal, local drivers turn in any money they have collected to a cashier who also works in the local dispatch office. The cashier is included in the terminal office employees unit.

Like central and line-haul dispatchers, local dispatchers have authority to do, and actually do on a day-to-day basis, various things which require the use of independent judgment. They authorize drivers to incur overtime pay. Such a situation arises when a driver calls in and reports that carrying out his mission will keep him out beyond his normal quitting time, for example, when a pickup which the local dispatcher calculated would be made at X o'clock cannot be made until Y o'clock. Local dispatchers authorize drivers to take their lunchbreak at a time before or after the period laid down in the contract. Such a situation arises, for example, when a driver wants to take care of a personal errand on his lunchtime. Local dispatchers authorize drivers to hire casual labor to help them load or unload trucks. Such a situation can arise either before the driver leaves the terminal or when he realizes that he needs help while at a customer's premises and calls into the office. Local dispatchers authorize drivers to deliver C.O.D. shipments on hand receipts. Such a situation arises when the driver calls in because a C.O.D. consignee has no money on hand. In each of these various situations, the answer which the local dispatcher gives to the driver is sometimes yes, sometimes no.

Once again, the above list by no means exhausts the situations in which drivers are in contact with and receive instructions from local dispatchers.

(2) Analysis and conclusions

Respondent contends that local dispatchers supervise local drivers. The General Counsel contends that the terminal manager supervises both local drivers and local dispatchers with no intermediate level of supervision between him and the drivers. I think that the preponderance of the evidence is so overwhelmingly on Respondent's side that, as in the case of central dispatchers, the question is not even close.

An inordinate amount of time was spent at the hearing haggling over whether local dispatchers have the authority to hire. The dispute centered around casual drivers and casual loaders/unloaders. As to the former, the questions put to witnesses descended almost to the semantics level. Is a casual driver hired when he is cleared by personnel and security and safety and his name is placed on the roster, or is he hired when the local dispatcher actually puts him to work? As to the latter, the questions went off in the direction of whether the use of casual labor has become so routinized as to remove the local dispatcher's role beyond the realm of independent judgment. Much was made of one situation, a cigarette manufacturer who regularly ships its product on Respondent's trucks, where the senior driver on the run automatically gets a helper to load each trailer at $10 per. While the sum total of the testimony establishes that other occasions when a driver calls in and asks if he can hire a helper are rare, it also establishes that such situations have, and do occur, and that, when they do, the local dispatcher weighs the economic pros and cons before giving the driver a yes or a no answer.

I see no necessity for deciding whether a local dispatcher hires casual drivers and/or casual labor within the meaning of the Act when he calls the former in to work or tells drivers they have permission to pick up the latter. It is sufficient for purposes of this proceeding that I find, for the reasons set forth above, that local dispatchers have authority responsibly to direct local drivers and their exercise of that authority is not of a merely routine or clerical nature but requires the use of independent judgment.

In summary, I find that all three categories of dispatchers at Respondent's Kernersville terminal are, and always have been, supervisors within the meaning of Section 2(11) of the Act. *Quality Transport Inc., supra; Pacific Intermountain Express Company* v. *N.L.R.B.*, 412 F.2d 1 (C.A. 10, 1969); *N.L.R.B.* v. *Gray Line Tours, Inc.*, 461 F.2d 763 (C.A. 9, 1972).

Having found that Respondent's dispatchers are, and always have been, supervisors within the meaning of the Act, I do not reach the issues posed by Respondent's contention that dispatchers are managerial employees because they express and make operative Respondent's decisions within the meaning of the Supreme Court's decision in *N.L.R.B.* v. *Bell Aerospace Co., Division of Textron, Inc.*, 416 U.S. 267 (1974), that managerial employees are "those who 'formulate and effectuate management policies by expressing and making operative the decisions of their employer'" and/or because it would be appropriate to exclude them from the unit "on the ground that their participation in a labor organization would create a conflict of interest with their job responsibilities" as suggested in footnote 20 of that same opinion.

2. The motive issue

a. *The fact issue*

The finding that Respondent's Kernersville dispatchers were supervisors within the meaning of the Act as of August 24, 1973, is dispositive of this proceeding since Respondent did not convert employees into supervisors when it issued job descriptions to dispatchers on September 26, 1973, and began sending them to a supervisory training program in February 1974. Ever mindful of the possibility of reversal, however, I turn to two other issues posed in this record. The second relates to the allegation that Respondent thereby refused to bargain with Local 391 in violation of Section 8(a)(5) and is discussed below. The first relates to the 8(a)(1) and (3) allegations and grows out of the allegation in the complaint that Respondent issued job descriptions and initiated training because dispatchers "joined or assisted the Union or engaged in other union activities or in concerted activities with other employees for the purpose of collective bargaining or other mutual aid and protection."

Evidence is nonexistent to counter Respondent's argument that it did what it did because of its good-faith belief that dispatchers were supervisors and that some of them were attempting to slough off part of the duties and responsibilities they had always had in order to be represented by the Teamsters. During the hearing, when I pointed out to counsel that the case they were trying was essentially a representation issue and would be better disposed of on the basis of the unit clarification record already in existence, I pointed to the motive paragraph of the complaint as creating an issue which was getting in the way of resolution of the real dispute between Respondent and the Union. In these colloquies General Counsel did not challenge the proposition that a finding of bad faith on the part of Respondent was

essential to an 8(a)(3) finding; he did assert that motive was immaterial to an 8(a)(1) finding. I disagreed with him then, and I disagree with him now. In my opinion, Respondent can only be held to have interfered with, restrained, and coerced its dispatchers in the exercise of their Section 7 rights if it acted for the wrong motive. I know of no reason why an employer cannot convert a category of employees from rank-and-file to supervisory status for economic reasons as distinguished from anti-Section 7 rights reasons. I would classify a desire to have employees who have had less than supervisory control over other employees in the past assume responsible direction of their work in the future as an economic motive. With regard to the theory advanced in the General Counsel's brief that proof of improper motive is unnecessary here, a theory growing out of the law relating to Section 8(a)(3) and discussed in the section entitled "The legal issue" just below, it applies to 8(a)(1) as well as to 8(a)(3). Insofar as this proceeding presents the issue of whether an illegal motive is essential to findings of violations, 8(a)(1) and 8(a)(3) must stand or fall together.

In the colloquies during the hearing the General Counsel pointed to little more as evidence of bad faith than the fact that Respondent had issued job descriptions and initiated a training program to the point where his position verged on *ipse dixit* or *res ipsa loquitur*. Evidence of Respondent's good faith in asserting that dispatchers were supervisors is found in all those parts of the record which relate to the events culminating on August 24, 1973. From the moment Respondent became aware that the Union wanted to include dispatchers in a terminal office employees unit, it took the position, both with the Union and with the dispatchers, that they were supervisors and not employees. For example, on July 13, 1973, when office employees walked out while dispatchers stayed in, J. M. Bumgarner, one of Respondent's vice presidents,

aware that dispatchers were interested in union representation, pointed out to those who happened to be on duty that they were ineligible because they were supervisors. The General Counsel argued that all the events which took place after August 24, 1973, are evidence of bad faith because Respondent engaged in bootstrapping; i.e., it did the things it did in an effort to create evidence in its favor for the upcoming unit clarification hearing. Generally, any events in the post-August 24 period have no weight as evidence because they are equally compatible with the finding that, even if Respondent was wrong about the dispatchers as of August 24, it was merely continuing to press that position in good faith after. The only portion of the record relating to events after August 24, 1973, which is arguably different involves the authority of line-haul dispatchers.

The job description issued to line-haul dispatchers on September 26, 1973, states that they have supervisory authority over dispatch clerks. I have found that, as of August 24, 1973, line-haul dispatchers did not supervise dispatch clerks. On Thursday, September 13, 1973, when line-haul dispatcher Larry Evans was on duty with dispatch clerk Jack Ray, supervisor of road dispatch, Lonnie Booe, telephoned Evans and asked him how things were going. Evans complained that Ray's work was inadequate. A week later, on the morning of September 20, as Evans was getting off work, Booe took Evans to a conference with then director of central dispatch, Julius M. Newell. Ray's ability to do the job was discussed. Evans was asked for his opinion. He said something should be done to straighten Ray out. There is no evidence that Booe or Newell made any further investigation of Ray's ability to do the job. Sometime after the conference, Booe told Evans to discharge Ray on the morning of Sunday, September 23, 1973. (The discharge was put off for a day or two to ensure that there would be a dispatch clerk on duty on Saturday night.) Evans did so. In this

incident, Evans effectively recommended the discharge of Ray.

It is possible to argue that Respondent staged the discharge of Ray as a bootstrapping effort to create evidence for the unit clarification proceedings. However, the facts are equally compatible with the finding that Respondent entertained a good-faith belief that its line-haul dispatchers had supervisory authority over its dispatch clerks, consulted with Evans and acted on his recommendation in good faith after he raised the subject of Ray's inadequacy, and listed various supervisory authorities over dispatch clerks in the job description it issued a few days later in good faith. I know of no reason why an employer cannot give a journeyman supervisory authority over his helper or a leadman supervisory authority over the employees under him so long as its motive for raising the journeyman or the leadman from employee to supervisor is not illegal. The effect of issuing job descriptions on September 26, 1973, was to confer on line-haul dispatchers supervisory authority over dispatch clerks. I find, therefore, that line-haul dispatchers now supervise both over-the-road drivers and dispatch clerks.

Because there is no evidence to justify a contrary finding, I further find that Respondent acted at all times in the good-faith belief that its Kernersville dispatchers were supervisors within the meaning of Section 2(11) of the Act.

b. *The legal issue*

I assume from the General Counsel's brief that he has abandoned the position that Respondent acted in bad faith. The only apposite cases he cites in support of the proposition that Section 8(a)(1) and (3) was violated by activities of Respondent that grew out of its position in the unit dispute are *Benson Wholesale Company, Inc.*, 164 NLRB 536 (1967), and *N.L.R.B.* v. *Great Dane*

Trailers, Inc., 388 U.S. 26 (1967). In *Benson* the employer ostensibly promoted five employees to supervisory status as a subterfuge "having for its purpose the suppression of union activity by those known union adherents." This was found to be an independent violation of Section 8(a)(1) in a context of illegal discharges for union activity and an illegal refusal to bargain. Clearly, with respect to the question alluded to above of whether illegal motive is an essential ingredient of an 8(a)(1) violation in this proceeding that would not be derivative of its 8(a)(3) aspects, *Benson* stands for the proposition that it is. Equally clearly, the job descriptions which Respondent issued were not a subterfuge in the sense that Respondent did not mean them accurately to reflect the duties and responsibilities it wanted its dispatchers to have as of September 26, 1973.

The General Counsel places his sole reliance on *Great Dane*, *supra*, arguing that there

> the Supreme Court shed further light on the factors necessary to establish a Section 8(a)(3) violation. After stating that "the statutory language 'discrimination . . . to . . . discourage' means that the finding of a violation normally depends on whether the discriminatory conduct was motivated by an anti-union purpose," the Court proceeded to set forth and explain the elements and burdens of proof involved in two different situations: (1) where the employer conduct involved falls within "an inherently destructive" category in which "the employer has the burden of explaining away, justifying, or characterizing 'his actions as something different than they appear on their face' and if he fails, an unfair labor practice charge is made out;" (2) "on the other hand, when 'the resulting harm to employee rights is comparatively slight, and a substantial and legitimate business end is served, the employer's conduct

> is *prima facie* lawful,' and an affirmative showing of improper motivation must be made. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which *could* have adversely affected employer rights to some extent, the burden is upon the employer to establish that he was motivated by a legitimate objective since proof of motivation is most accessible to him." Counsel for the General Counsel submits that applying the foregoing principles to the instant case the Employer's conduct here, i.e., the conversion or attempted conversion of these dispatchers to supervisors, as discussed above in violation of Section 8(a)(1), and as discussed below in violation of Section 8(a)(5), is inherently destructive of significant employee rights and thus within (1) above.

Even if this proceeding falls in *Great Dane's* first category, a proposition about which I have reservations, Respondent has met the burden imposed upon it. My finding of fact that, even if mistaken, Respondent acted at all times in the good-faith belief that its dispatchers had always been supervisors is not based on the General Counsel's failure to prove an illegal motive. Rather, it is based on Respondent's showing that it was motivated by that belief and no other. I find, therefore, that, even if Respondent and I are mistaken about the status of its dispatchers as of August 24, 1973, there has been no violation of Section 8(a)(1) and (3) of the Act because Respondent's motive for issuing job descriptions on September 26, 1973, and initiating a training program in February 1974 was not to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights or to discriminate against them in order to encourage or discourage union membership.

3. The duty to bargain issue

The dispute over the applicability of the Freedom of Information Act referred to in the section above entitled

"The Due Process Issues" arose because the General Counsel refused to make intraagency correspondence available to Respondent. Respondent argued that it was entitled to such material because General Counsel had not indicated in his pleading or in information made available to Respondent the theory on which it contended a duty to bargain had arisen. As the General Counsel conceded during the hearing, this is not a *Gissel* case (*N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969)), or a *Snow & Sons* case (*Fred Snow, Harold Snow and Tom Snow d/b/a Snow & Sons*, 134 NLRB 709 (1961), enfd. 308 F.2d 687 (C.A. 9, 1962)), or a Board certification case. It is most emphatically not a voluntary recognition case, for the question of whether dispatchers were in or out of the unit as to which Respondent did grant voluntary recognition on August 24, 1973, was the very issue as to which Respondent reserved its right to a Board determination in the settlement it entered into that day. As a practical matter, the procedural dispute has been rendered moot by the passage of time. As the General Counsel's brief reveals, he has no special theory.

Omitting the discussion of the cases clearly inapposite, because they involve situations in which there is no question but that a duty to bargain has arisen, cited by the General Counsel, his 8(a)(5) argument runs:

> The underlying premises to an 8(a)(5) duty to bargain over the change in status of dispatchers are: that the Employer had knowledge of the dispatchers' majority status (14 of 19 cards) after the card check on August 28, 1973 and that the issuance of the job description on September 26 and 27 did, in fact, accepting the Employer's theory, change the dispatchers to supervisors. The Board law in this area involves changes in production or distribution methods or reorganization of personnel for economically

> justified reasons. The Employer here could not set forth the economic justifications in that it elected to proceed on the contention that the dispatchers had always been supervisors and the issuance of the job description was merely a codification of their duties.
>
> * * * *
>
> As noted earlier, Counsel for the General Counsel submits that the duty to bargain with respect to changes in the dispatchers' duties arose with the recognition agreement of August 24, wherein the Employer recognized the union as bargaining agent for a unit of office clerical employees, including, if employees, the dispatchers here in dispute. The mere reservation of a right to litigate the status of employees asserting a right to be represented, does not permit the Employer to then unilaterally change these contested employees' titles and duties so as to exclude them from the unit. This is analogous to a case where the employer may challenge certain voters presenting themselves at the polls as supervisors. Assuming their votes are not determinative, a Board certification would issue in the unit. If the parties could not resolve the dispute as to the inclusion of those disputed employees in the unit, the matter could be resolved by way of a unit clarification proceeding, or in the event of unilateral changes in these employees' duties by way of the unfair labor practice route. . . .
>
> The Employer has here attempted to deprive a significant number of employees in the bargaining unit which it recognized on August 28, of their Section 7 rights.

"The mere reservation of a right to litigate the status of employees asserting a right to be represented, does not permit the Employer to then unilaterally change these

contested employee's titles and duties so as to exclude them from the unit" is, once again, an *ipse dixit* argument. This situation is, indeed, analogous to a Board election where the challenged ballots of employees whose inclusion in the unit is a matter of dispute are determinative. It is even more analogous to a Board election in which the inclusion of specific categories of employees is settled before the employees even go to the polls. In both of those cases, the employer is under no duty to bargain at all, much less under a duty to bargain about the disputed employees, before the unit questions have been resolved. Here, by entering into an agreement with the Union on August 24, 1973, to recognize all employees except the dispatchers and thereafter bargaining in good faith to a contract with the Union about all terminal office employees save only the disputed dispatchers. Respondent gave more than the Act would have required. Until the issue of whether dispatchers were supervisors or employees on August 24 is resolved, no duty to bargain about them can be imposed on Respondent. That issue had not been resolved on September 26, 1973, or in February 1974 when the events took place on which the General Counsel predicates a duty to bargain. It had not been resolved on April 22, 1974, when the General Counsel, by issuing the initial consolidated complaint in Cases 11-CA-5506 and 11-CA-5642, first gave Respondent official notice that it claimed such a duty to bargain had arisen. It is not resolved by the decision in this proceeding. Absent an agreement between Respondent and the Union to bound by results of this proceeding, it will only be resolved when a final decision issues in Case 11-UC-15. I find, therefore, that, even if I am wrong about the supervisory and the motive issues, there has been no violation of Section 8 (a) (5) of the Act because Respondent was under no duty to bargain over the wages, hours, and conditions of employment of its dispatchers on September 26, 1973, or in February 1974.

4. The independent 8(a) (1) allegations

Julius M. Newell succeeded Sidney Elms as Respondent's director of central dispatch only to be succeeded in turn by Elms. Elms returned to Kernersville sometime between the discharge of Jack Ray in September 1973 and April 1974. (By the time of the hearing, he was gone again, replaced by Joe Scott.) The context of conversations in April which are alleged as independent violations of Section 8(a) (1) on the theory they constitute interrogation, threats, and solicitation of employees to withdraw their support from the Union makes it clear that his return was closer to the spring of 1974 than the late summer of 1973. The testimony of General Counsel's witnesses as to each of these conversations is uncontroverted. The theme that runs through each is that the schisms which had developed among the dispatchers and the gulf which had opened between dispatchers and Respondent as a result of the unit issue could easily be healed and the friendly working conditions of yore could easily be restored if only the dispatchers would forget about the Union.

Maurice Chamblee, a central dispatcher, testified that Elms took him into his office, closed the door, and said

> He wanted to know if things had improved since he came back to Kernersville. He said he knew that we were working under hardships, he could tell by talking to us on the phone from Charlotte. He said that was one of the reasons that he came back to Kernersville. He felt it was his duty to the Company.
>
> * * * *
>
> He wanted to know was there any way he could negotiate our problems, that he would go to higher personnel and try to work it out. And I told him that all of us Dispatchers had talked it over and decided that we would take the position that we started.

Q. What position was this, if you said?
A. Stay with the Union activities.
Q. What, if anything, did Mr. Elms say?
A. After I told him that we just went to general conversation then.

John Blaylock, another central dispatcher, testified Elms took him into the driver supervisor's office and said

"I guess you are wondering what this is all about," and I said, "Yes, sir, I sure do."

And he said, "I guess you know, I haven't talked to you boys on this union situation since it started; I haven't said anything at all about it."

And I said, "Yes, sir, not to me you haven't."

And he said, "Well, just what do you think about it?" He said, "What do you think about this situation?" And he just bluntly hit me with that.

And I said, "Mr. Elms, to tell you the truth, I hadn't thought that much about it."

And he come back, he said, "Well, I sure would like to see this mess over with and done away with once and for all." He said, "I am sure it would take a whole lot of stress and strain off of everybody, won't it?"

And I said, "I am sure it would too, Mr. Elms, I am sure it would."

And he said, "we can settle back down in here." He said, "we are one little happy family." He said, "I think we can work our problems out between ourselves." He said one way that I think you all can get rid of this thing," which was referring to the union situation, which we were involved in the organization at that time.

He said, "That is, all you boys in Central Dispatch can sign a letter and send it to the union to just withdraw this case, to just drop it"; and he

says, "as I stated before, it will take a whole lot of stress and strain off of everybody."

"Now," he said, "don't worry"; he said, "I don't hold no grudges toward none of you." He said, "I have got no spite, no grudge toward any of you, don't get worried about nobody getting run off or fired."

He said, "as far as I am concerned, that is not going to happen; ain't nobody going to [get] run off or fired."

And I said, "Well, Mr. Elms, I can't talk for the whole group."

I said, "this is a group thing. Everybody is in it together, we have got to work together."

And I said, "you know, in running freight, you have got to get along together, everybody, and to give service on this freight, which is our job, service and coordinate freight."

And he said, "that's true," but he said, "I ain't going to make no answer." He said, "I am starting tonight." He said, "I just started tonight, I talked to Richie a while ago"; and he said, "I am going to talk to each and every one of you."

He said, "you all bounce the ball around and talk it over." He said, "what we are saying now is between me and you." He said, "there is one thing I am going to tell each and every one of you though, just one thing I am going to tell all of you, and that is, if you all have got problems, if you all want to work out problems; if you have got problems you all want to work out; or if you all want to go see Mr. Sharp," who is the President and owner of Pilot Freight, he said, "if you want to go see him, you all just let me know and get together. I will personally make you an appointment and take you over there." He said, "I am going to tell each and every one of you that."

I said, "as I stated before, Mr. Elms, I think that we should all bounce the ball and talk it over because we have all got to work as a group, and I can't talk for the group" and so that was about the extent of the conversation.

Grady Kaiser, a line-haul dispatcher, testified he was in Elms' office and

Well, the only thing he mentioned to me was that he wanted to get the situation with the union straightened out and that he would like to see all of us forget about the union activities and everything be back to normal like it was at one time.

Q. What, if anything, did you say to him?

A. I told him that I was going to stick with the majority, whatever they would say.

Q. Do you recall anything else from that conversation?

A. No, it was, he didn't; there was no threats; it was just a quiet meeting.

Oscar Hill, a dispatch clerk, testified Elms took him into his office and

Well, we had just some general small talk. He wanted to know how I felt, and so on, and then he asked me would I be interested in just forgetting about the union and getting everything back in the office like it used to be.

Q. All right, did you make any reply to that?

A. Yes, sir, I told him that I didn't know; I said "we went an awful long ways here, we had probably gone too far to do anything like that."

Q. And what, if anything, did Mr. Elms say?

A. Well, he said "we had not, and that if we wanted to drop the union, that we should not have any fear of being fired or discharged, or any disciplinary action taken against us.

Q. Do you recall anything else from that conversation?

A. I told him I would go along with anything the majority of the dispatchers wanted, and he said that he would get back with me at a later date, and find out my decision, and told me to discuss it with the other dispatchers.

The only one of these individuals who was not a supervisor at the time Elms talked to him was Hill. Thus, it is the only conversation that could be violative of the Act. Even if it were, it would be an isolated incident and thus would not be coercive. I find, therefore, that Respondent did not violate Section 8(a)(1) of the Act when Elms talked to employees in April 1974.

Upon the foregoing findings of fact, and upon the entire record in this proceeding, I make the following:

CONCLUSIONS OF LAW

1. Pilot Freight Carriers, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Chauffeurs, Teamsters and Helpers Local Union No. 391, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. The allegations of the complaint that Respondent violated Section 8(a)(1), (3), and (5) of the Act by issuing job descriptions to its dispatchers on September 26, 1973, and by initiating a supervisory training program for them in February 1974 have not been sustained.

4. The allegations of the complaint that Respondent interrogated and threatened employees and requested and directed them to withdraw their union authorization

cards, abandon the Union, and deal directly with management, all in violation of Section 8(a)(1) of the Act, when Sidney Elms talked to employees on various dates in April 1974 have not been sustained.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER [1]

The complaint is dismissed in its entirety.

[1] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

APPENDIX C

The provisions of the National Labor Relations Act, as amended, which are involved herein are as follows:

SEC. 2. When used in this Act—

* * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

* * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

* * * *

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e)

within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

APPENDIX D

[SEAL]

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

January 18, 1977

William K. Slate, III, Esquire
Clerk, United States Court of
Appeals for the Fourth Circuit
10th & Main Streets
Richmond, Virginia 23219

Re: No. 76-1089—*N.L.R.B.* v. *Pilot Freight Carriers, Inc.* (C.A. 4) Board Case Nos. 11-CA-5506, 5642, 5718

Oral Argument held Sept. 15, 1976, before Chief Judge Haynsworth and Circuit Judges Winter and Butzner

Dear Mr. Slate:

We understand, although we have not yet been served with a copy of the letter, that counsel for Pilot Freight Carriers, Inc. has recently sent a letter to your office, for submission to the panel considering the above case, contending that the decision of the Regional Director for Region 12 in *Pilot Freight Carriers, Inc.*, 12-RC-5204, dated November 22, 1976, a representation case, conflicts with the decision of the Board in the above case. In the representation case, the Regional Director found that the Company's line-haul dispachers at the Jacksonville terminal are supervisors, and not employees under the National Labor Relations Act, as amended.

As the Regional Director found, the Company's Jacksonville terminal is a relay station coordinating all the Company's freight and road equipment throughout the

State of Florida. Unlike the Kernersville terminal, the Company's main break-bulk terminal, the Jacksonville terminal has no driver supervisors. Thus, functions performed by the driver supervisors at the Kernersville terminal, including discretion to deviate from the collective bargaining agreement, granting time off, disciplining drivers, refusing to dispatch a driver, hiring and assigning work to casual drivers, laying off of drivers, and assigining overtime to the drivers, are performed by the line-haul dispatchers at the Jacksonville terminal. Furthermore, unlike the Kernersville terminal, the line-haul dispatchers, because of the absence of driver supervisors, are the only management representatives at the Jacksonville terminal from 5:00 p.m. to 8:00 a.m. Monday through Friday and throughout the weekends. During these times, as the Regional Director found, the line-haul dispatcher on duty "is completely in charge of directing the moving of freight, with no higher authority on hand."

Regarding the appropriate standard to be applied by a reviewing court considering the Board's specific application of broad statutory terms, including the terms "employee" and "supervisor," we enclose copies of the Supreme Court's recent decision in *Bayside Enterprises, Inc.* v. *N.L.R.B.*, decided January 11, 1977.

Very truly yours,

/s/ Elliott Moore
ELLIOTT MOORE
Deputy Associate General Counsel

Enclosures

cc with enc.: J. W. Alexander, Jr. and
John O. Pollard, Esquires
Blakeney, Alexander & Machen
3450 NCNB Plaza
Charlotte, North Carolina 28280

Robert M. Baptiste, Esquire
International Brotherhood of Teamsters,
Chauffeurs, Warehousemen and Helpers
of America
25 Louisiana Avenue, N.W.
Washington, D.C. 20001

Angelo V. Arcadipane, Esquire
Federal Bar Building
1819 H Street, N.W.
Washington, D.C. 20006

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-470

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION NO. 391, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner

vs.

PILOT FREIGHT CARRIERS, INC.,
and
NATIONAL LABOR RELATIONS BOARD,

Respondents

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR PILOT FREIGHT CARRIERS, INC. IN OPPOSITION TO PETITION

WHITEFORD S. BLAKENEY
J. W. ALEXANDER, JR.
JOHN O. POLLARD
Charlotte, North Carolina 28280

Of Counsel:
BLAKENEY, ALEXANDER & MACHEN
3450 NCNB Plaza
Charlotte, North Carolina 28280

TABLE OF CONTENTS

CITATIONS

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-470

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION NO. 391, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner

vs.

PILOT FREIGHT CARRIERS, INC.,
and
NATIONAL LABOR RELATIONS BOARD,
Respondents

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR PILOT FREIGHT CARRIERS, INC. IN OPPOSITION TO PETITION

REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE ISSUED IN THIS CASE

This is but another in a series of cases growing out of the continuing effort of those—primarily the Teamsters Union—who would have the provisions of the National Labor Relations Act extended, by Labor

Board fiat, to a class of persons—namely, motor carrier dispatchers—regardless of what duties or authorities they may have with respect to other employees. See, *National Labor Relations Board v. Metropolitan Petroleum Co.*, 506 F. 2d 616 (1st Cir. 1974); *National Labor Relations Board v. Gray Line Tours, Inc.*, 461 F. 2d 763, 764 (9th Cir. 1972); *Pacific Intermountain Express Co. v. National Labor Relations Board*, 412 F. 2d 1, 2-4 (10th Cir. 1969); *Eastern Greyhound Lines v. National Labor Relations Board*, 337 F. 2d 84 (6th Cir. 1964).

In each of these cases, the Courts of Appeals rejected findings of the National Labor Relations Board to the effect that the dispatchers were "employees" rather than supervisors.

In the instant case, as in the others, the Board's inquiry necessarily was factual. That is, the Board was required to examine the duties and responsibilities of the dispatchers to determine whether they possessed any of the statutory authorities which would accord them the status of supervisors within the meaning of the National Labor Relations Act.[1]

---

[1]Section 2(11) of the Act defines the term "supervisor" as:

"[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

It is well settled that Section 2(11) must be read in the disjunctive. That is, if the Board's Administrative Law Judge in this case had found that the dispatchers possessed only one of the powers described in the statutory list, he would have been absolutely bound to rule that they were supervisors and not covered by the Act. See, *e.g., James H. Matthews & Co. v. National Labor Relations Board*, 354 F. 2d 432, 434 (8th Cir. 1966). Here the Administrative Law Judge actually found much more than that. On the basis of conclusive proof[1], he found that these dispatchers possessed, and regularly exercised through the use of independent judgment, *numerous* of the requisite powers and authorities (50a-61a, 66a-72a, 73a-76a). Thus, by statutory definition, they were supervisors[2] and no further inquiry, conclusion or inference was necessary or permissible.

Upon appeal, a three-member panel of the Board found no material conflict in the evidence, thereby establishing the validity of the Administrative Law Judge's factual determinations. Nevertheless, the Board reversed the Administrative Law Judge by ignoring on a wholesale basis the evidence upon which he had relied and which compelled the ruling he made. Instead the Board focused its attention upon bits and pieces of other evidence in the record from

---

[1]The petitioner admits that there is no material dispute about the accuracy of the fact finding (Petition, pp. 3, 9).

[2]Thus characterized, the dispatchers are excluded from the provisions of the National Labor Relations Act by §2(3) of the Act.

which it claimed to be persuaded that the dispatchers, although undisputedly possessing the requisite authorities, did not utilize independent judgment in exercising them (22a-26a).

When confronted with this decisional sleight of hand, the Court of Appeals first set out the standard by which it was to be guided in reviewing the Board's actions.

> "We must accept the Board's finding if it is supported by substantial evidence on the whole record, *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) even if we might have resolved the question differently. *Bayside Enterprises v. NLRB*, 45 USLW 4086, (January 11, 1977). Deference to the Board's findings is especially appropriate here because the case involves but one specific instance of the "[m]yraid forms of service relationship, with infinite and subtle variations in the terms of employment, [which] blanket the nation's economy,' and which the Board must confront on a daily basis.

Id. at 4087."[1]

The propriety of that standard in cases of this nature is well settled. Section 10(e) of the National Labor Relations Act requires reviewing courts to observe that the "findings of the Board with respect to

[1]Subsequent to the filing of the Petition, the Court of Appeals decision has been printed in the official reports. *National Labor Relations Board v. Pilot Freight Carriers, Inc.*, 558 F. 2d 205, 207-208 (4th Cir. 1977).

questions of fact, if supported by substantial evidence on the record as a whole shall be conclusive."

This Court subsequently interpreted this statutory language as follows:

> ". . . Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.
>
> . . .
>
> "Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."
>
> *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 488, 490 (1951).

By applying this standard, the Court of Appeals concluded that the record simply would not permit any finding other than that all of Pilot's local, line-haul and central dispatchers were supervisors within the meaning of the Act.

> "But neither the General Counsel nor the Board have directed us to substantial evidence supporting the Board's decision. We have examined the lengthy transcript as well as the material submitted in the joint appendix and find no substantial evidence to rebut the testimony that indicates that the dispatchers involved here possessed supervisory authority requiring the use of independent judgment as defined by §2(11)."
>
> *National Labor Relations Board v. Pilot Freight Carriers, Inc.*, 558 F. 2d at 208.

Thus, the Court of Appeals has dealt with a federal statutory or procedural standard in a manner which, far from being in conflict with applicable decisions of this Court,[1] is unquestionably in strict accordance with such decisions.

Moreover, when a reviewing court has employed the proper standard, this Court has carefully defined the limitations imposed upon its own review of the actual application of that standard in specific cases.

> "Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole

[1]See Rule 19 of the Revised Rules of The Supreme Court.

> there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. *This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied*" [emphasis added].
>
> *Universal Camera, supra,* at 490-491.

The petitioner, in reality, is seeking to have this Court discard the essential principles set forth in *Universal Camera* and in Sections 2(3), 2(11) and 10(e) of the Act. In place of this authority, the Court is being urged to resurrect and give renewed vitality to outmoded principles of the past. Thus, petitioner now asserts that the Court of Appeals erred in failing to accede to limitations upon its review of the Board's exercise of its fact-finding authority which were supposedly established by this Court more than 30 years ago.

In *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), the Court, after an extensive review of the pertinent facts, upheld a determination by the Board that boys who delivered newspapers were "employees" of the newspaper publisher and, as such, subject to certain statutory protections. In arriving at its decision, the Court stated that:

> ". . . [Where, as here,] the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially . . . the Board's

> determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law."
>
> 322 U.S. at 131.

The petitioner construes this language as having established a different standard of review to be applied by Courts of Appeals when they are scrutinizing Board decisions which involve what it characterizes as a "mixed determination of law and fact within the field of [the Board's] specialized expertise" (Pet., 8). Thus, the Court of Appeals erred, according to petitioner, by failing to "accept" a decision by the Board which was supposedly arrived at through the application of its special "expertise". That is, the Board's determination that Pilot's dispatchers legally were "employees" rather than "supervisors" was subject to very limited review by the Court of Appeals because the Board is more "expert" than the Court in making decisions of this nature.

The petitioner then extends its principle of limited review to the point where the reviewing Court must confine its examination of purely factual determinations to a single question—namely, whether there is a "rational basis" for Board decisions (Pet., 8).

What is left unsaid—but nevertheless and necessarily implicit in petitioner's argument—is the assertion that Board determinations in areas of its supposed "expertise" may never be set aside by reviewing courts because the very expertise which was presumably em-

ployed in arriving at them renders them unassailable by any body not possessing the same degree of "expertness". Thus, under petitioner's argument, such factual determinations are restricted not merely to limited review—they are virtually *immune* from review.

The absurdity of such a claim, particularly in light of the congressional and judicial authority set out above, is so patently obvious as to merit little, if any, further discussion. It is perhaps worthwhile, however, to point out that the petitioner's claimed legal authority for its incredible proposition was superseded long ago in all pertinent respects.

Even if the language in *Hearst Publications* could be construed as establishing the principle of non-review claimed by the petitioner, it must be remembered that the "Act" referred to in that case was the original National Labor Relations Act—known as the "Wagner" Act. And the "broad statutory term" referred to read simply as follows:

> "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic

service of any family or person at his home, or any individual employed by his parent or spouse."

National Labor Relations Act
(Wagner Act), Section 2(3),
29 U.S.C. §152(3).

Three years after the *Hearst* decision was issued, Congress, expressing its concern with the way the Board had interpreted this broad statutory definition of "employee" to extend coverage of the Act to classes of persons beyond those intended, amended the Act to make clear that certain of these classes were to be excluded.

"The term 'employee' . . . shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of *an independent contractor, or any individual employed as a supervisor* . . ."[1] [emphasis added].

Labor Management Relations Act
(Taft-Hartley Act), Section 2(3),
29 U.S.C. §152(3).

This, in effect, overruled *Hearst Publications*.

[1]While *Hearst Publications* dealt with the question of whether the newsboys were independent contractors (rather than whether they were supervisors), the distinction is not a material one here because, as emphasized, both independent contractors and supervisors were specifically excluded in the Taft-Hartley Amendments. And the latter were excluded in response to decisions similar to *Hearst Publications* which had extended coverage of the Wagner Act to foremen. See *National Labor Relations Board v. Bell Aerospace Co.*, 416 U.S. 267, 277-278 (1974).

That fact was succinctly noted in a recent decision by the Court of Appeals for the Second Circuit. In *Lorenz Schneider Co., Inc. v. National Labor Relations Board*, 517 F. 2d 445 (2nd Cir. 1975), the Board had argued to the Court of Appeals essentially what the petitioner has asserted here—namely, that a Board determination of "employee" status is an unassailable exercise of its special expertise.

First, the Court framed the issue before it in these terms:

"We are again required to review one of the National Labor Relations Board's (NLRB) case-by-case determinations whether the relationship between a business enterprise and other persons is that of employer and employee or falls within the exclusion of 'any individual having the status of an independent contractor' which Congress added to §2(3) of the National Labor Relations Act (NLRA) in the Taft-Hartley Act in reaction to NLRB v. Hearst Publications, Inc., 322 U.S. 111, 64 S. Ct. 851, 88 L. Ed. 1170 (1944). See NLRB v. United Insurance oC., 390 U.S. 254, 256, 88 S. Ct. 988, 19 L. Ed. 2d 1083 (1968)."

517 F. 2d at 446.

The Court then pointed out the utter fallacy of what is essentially the same contention now made by the Union to this Court.

"The legislative history of the Taft-Hartley Act reveals a clear desire on the part of Congress to restrain the tendency of courts, as evidenced in the

Hearst Publications decision, to bow to the supposed expertness of the Board in its assessment whether a particular group should be considered employees for purposes of §2(3) of the National Labor Relations Act, 49 Stat. 449, 450 (1935). See H.R. Rep. No. 245, 80th Cong., 1st Sess., 18 (1947), reprinted in 1 Leg. Hist. of the Labor Management Relations Act, 1947, p. 309 (1948) . . ." [emphasis added].

517 F. 2d at 416, n. 1.

CONCLUSION

Upon all of the foregoing, Pilot Freight Carriers, Inc. earnestly contends that a Writ of Certiorari should not be granted in this case.

Respectfully submitted,

WHITEFORD S. BLAKENEY
J. W. ALEXANDER, JR.
JOHN O. POLLARD
Attorneys for Pilot Freight Carriers, Inc.

No. 77-470

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION NO. 391, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

v.

PILOT FREIGHT CARRIERS, INC.,

AND

NATIONAL LABOR RELATIONS BOARD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY TO OPPOSITION BY RESPONDENT PILOT FREIGHT CARRIERS, INC. TO THE PETITION FOR CERTIORARI

DAVID PREVIANT, ESQUIRE
ROBERT M. BAPTISTE, ESQUIRE
25 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 624-6945

ANGELO V. ARCADIPANE, ESQUIRE
WILLIAM W. OSBORNE, JR., ESQUIRE
1819 H Street, N.W.
Washington, D.C. 20006
(202) 785-3525

Attorneys for Petitioner

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-470

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION NO. 391, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

v.

PILOT FREIGHT CARRIERS, INC.,

AND

NATIONAL LABOR RELATIONS BOARD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY TO OPPOSITION BY RESPONDENT PILOT FREIGHT CARRIERS, INC. TO THE PETITION FOR CERTIORARI

The following is submitted by Petitioner, Chauffeurs, Teamsters and Helpers Local Union No. 391, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, in reply to the Brief of Respondent Pilot Freight Carriers, Inc.

in Opposition to the Petition herein, pursuant to Rule 24 of the Revised Rules of the Supreme Court.

PRELIMINARY STATEMENT

Ordinarily a reply brief would be unnecessary where, as here, the Respondent Pilot Freight's Opposition to the Petition raises no new arguments pertaining to the appropriateness of granting a writ of certiorari which were not adequately addressed in the Petition itself. However, the Brief in Opposition reflects a number of misstatements of relevant legal principles which should be brought to the Court's attention.

ARGUMENT

1. As Respondent Pilot Freight acknowledges, there is in this case "no material conflict in the evidence." (Opp., 3).[1] Yet, Respondent also contends that this case presents no more than a "factual" dispute (Opp., 2), and that therefore the *Universal Camera* standard of appellate review (*Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951)) applied by the court below was proper.[2] (Opp., 4-6). As shown in the Petition, the standard of review announced in *Universal Camera* is directed only to issues involving the evidenciary support for an agency's findings of fact (Pet., 10-11). Since the evidenciary facts are admittedly not in dispute and the only question in contro-

[1] References to the Petition for Certiorari and to the Opposition to Petition are cited herein as (Pet., ——) and (Opp., ——), respectively. The Respondent, National Labor Relations Board filed a Memorandum with the Court on December 2, 1977. References to the Board's Memorandum are cited herein as (Mem., ——).

[2] The Board in its Memorandum recognizes that the Fourth Circuit's disagreement with the Board was not over what the facts of this case are, but instead "the difference between the Board and the Court turns . . . on a differing *evaluation* of the facts of this . . . case". (Mem., 4, emphasis added).

versy is the Board's expert evaluation of undisputed facts in terms of the statutory definition of "supervisor", the more narrow scope of review mandated by this Court in *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944) is required. (Pet., 8-10; Mem., 4).

For the same reason, Respondent's citation of *Universal Camera* as limiting this Court's review of cases involving mere factual, evidenciary issues is also mistaken. (Opp., 6-7).

2. While Respondent correctly recognizes that the *Hearst* standard of review requires greater deference to an agency's expertise than the *Universal Camera* standard (Opp., 7), its assertion that application of the *Hearst* standard would render the Board's determination of supervisory status under the Act "unassailable" or completely immune from review is plainly incorrect. (Opp., 8-9). According to this Court, an appellate court may properly reject such a determination by the Board under *Hearst* if it lacks either "warrant in the record" or "a reasonable basis in law." (Pet., 8-9). This Court recently applied the *Hearst* standard of review to set aside Board determinations in similar circumstances. *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166 (1971). Circuit courts have also exercised this authority. See, e.g., *Wichita Eagle & Beacon Publishing Co., Inc.* v. *NLRB*, 480 F.2d 52, 54-55 (10th Cir. 1973), *cert. denied*, 416 U.S. 982 (1974).

3. It was surprising to learn that this Court's *Hearst* decision has been overruled. (Opp., 10). Numerous Supreme Court decisions cited in the Petition reflect the continued viability of *Hearst*. However, if there is some reasonable basis for Respondent's assertion that *Hearst* has been overruled, then a significant question of federal law is presented which should be settled and an additional reason exists for granting the writ of certiorari. Rule 19(b) of the Revised Rules of the Supreme Court.

4. By attempting to equate judicial review of Board determinations pertaining to "independent contractor" status with those regarding the status of individuals as "supervisors", Respondent attempts to paper over a legal distinction which is crucial to the Court's proper consideration of this case. (Opp., 10-11). As to the "independent contractor" issue, Congress specifically removed that question from the Board's expertise by mandating that principles of common law agency be applied. *NLRB* v. *United Insurance Co.*, 390 U.S. 254, 260 (1968). In contrast, Congress of necessity drew upon established Board principles for its definition of "supervisor" S. Rep. No. 105, S. 1126, 80th Cong. 1st Sess. 4 (1947). There is no common law concept of "supervisor". This obviously important distinction is addressed at great length in the Petition so as to make extended discussion herein unnecessary. (Pet., 10). Compare *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co., supra*, and *NLRB* v. *United Insurance Co., supra.*

The decision of the Second Circuit in *Lorenz Schneider Co., Inc.* v. *NLRB*, 517 F.2d 445 (2nd Cir. 1975) was, accordingly, miscited by Respondent since it dealt with appellate review of a Board determination regarding the status of individuals as "independent contractors" rather than as "supervisors". (Opp., 11).

5. Finally, nowhere in its Opposition does Respondent address the disagreement among appellate courts on this important question of judicial review. (Pet., 11-12). If the applicability of the *Hearst* standard of review to the issues in this case is indeed as "incredible" as Respondent would have the Court believe (Opp., 9), surely there would be no judicial confusion.

CONCLUSION

As Respondent acknowledges, the rights under the Act of an entire "class of persons" in the transportation industry will be vitally affected by the resolution of this case. (Opp., 1-2). Yet once the misstatements of applicable legal principles are eliminated from its Opposition, Respondent has offered no good reason for the Petition to be denied. The real issue in this case is whether or not the Board's expert determination that the Company's individual dispatchers are "employees" under the Act rather than "supervisors" was given appropriate deference by the Fourth Circuit, as required by this Court's *Hearst* doctrine. We submit that the questions of public policy and administrative procedure presented by this case are critical ones which should be addressed by the Court.

For the foregoing reasons, and those stated in the Petition, we reiterate our request that this Petition be granted.

Respectfully submitted,

DAVID PREVIANT, ESQUIRE
ROBERT M. BAPTISTE, ESQUIRE
25 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 624-6945

ANGELO V. ARCADIPANE, ESQUIRE
WILLIAM W. OSBORNE, JR., ESQUIRE
1819 H Street, N.W.
Washington, D.C. 20006
(202) 785-3525

Attorneys for Petitioner

No. 77-470

In the Supreme Court of the United States

OCTOBER TERM, 1977

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION NO. 391, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

PILOT FREIGHT CARRIERS, INC., AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-470

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION NO. 391, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

PILOT FREIGHT CARRIERS, INC., AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

---

1. The Board, reversing the Administrative Law Judge, found that the local, line-haul, and central dispatchers at the Company's Kernersville, North Carolina terminal were "employees," rather than "supervisors,"[1] when the Company, just prior to a Board unit clarification proceeding[2] to resolve their employment

---

[1]Supervisors, as defined in Section 2(11) of the National Labor Relations Act, 29 U.S.C. 152(11), are excluded from the coverage of the Act.

[2]The proceeding was instituted on petition of the Company to determine whether the dispatchers should be included in the bargaining unit with the Company's office employees (Pet. App. 37a). See 29 C.F.R. 102.60(b), 102.61(d).

status, issued new job descriptions purporting to grant them supervisory authority (Pet. App. 26a). Accordingly, the Board found that the Company violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by coercively interrogating and threatening the dispatchers because of their union activities; Section 8(a)(3), 29 U.S.C. 158(a)(3), by issuing them supervisory job descriptions even though they never had, nor exercised, supervisory responsibilities; and Section 8(a)(5), 29 U.S.C. 158(a)(5), by changing their job responsibilities without consulting with the Union after a majority of the dispatchers had selected Teamsters Local 391 as their bargaining representative and while resolution of their employment status was awaiting the unit clarification proceeding[3] (Pet. App. 27a-28a).

2. The court of appeals denied enforcement of the Board's order, concluding that, prior to the issuance of the job descriptions, "the dispatchers involved here possessed supervisory authority requiring the use of independent judgment as defined by §2(11)" (Pet. App. 5a). Thus, the court found that the local dispatchers responsibly directed the local drivers because they had the authority "to assign local drivers to different areas and different times than those for which they had bid, decide the amount of pick-up work given to a driver, select

[3]Teamsters Local 391 began an organizational campaign among the Kernersville terminal office and maintenance employees in March 1973. In August 1973, the Company and the Union agreed to resolve the representation question through a card check with the Company reserving the right to litigate the status of its dispatchers before the Board in a unit clarification proceeding. On August 28, 1973, the arbitrator conducting the card check determined, *inter alia*, that 14 of the 19 dispatchers executed valid authorization cards on behalf of the Union. On September 26, 1973, six days after it filed a unit clarification petition with the Board, the Company issued the supervisory job description to its dispatchers (Pet. App. 26a-27a).

casual casual drivers,[4] and generally act as the first line supervisor of the local drivers" (Pet. App. 10a). The court also found that the line-haul dispatchers responsibly directed over-the-road drivers by preventing inebriated drivers from going on the road, by insuring that the drivers were not reporting unreasonably late for duty, and by "running-around" a driver based on assessment of a driver's ability or availability[5] or permitting a driver to switch loads to meet a scheduled freight delivery (Pet. App. 14a-15a). Finally, the court found that the central dispatchers had authority to permit over-the-road drivers to end the work day early and to vary their routes for personal reasons (Pet. App. 16a).

Accordingly, the court held that (Pet. App. 18a):

> [s]ince the dispatchers were already supervisors when the company issued the job descriptions * * *, the company did not violate the Act by altering the dispatchers' duties without consulting the union and cannot be accused of attempting to deprive the dispatchers of their rights by unilaterally changing the dispatchers into "supervisors." In view of the supervisory status of the dispatchers, the company was also free to talk with them about their union activities.

3. The basic question presented is whether the Board properly concluded that the Company's dispatchers did not responsibly direct employees but exercised independent judgment only with respect to the movement of

[4]A "casual casual driver" is a part time local driver having no seniority with the Company who drives solely on an "as-needed" basis (Pet. App. 6a, 74a).

[5]A "runaround" occurs when a line-haul dispatcher assigns a load to a driver whose name is not at the top of the bid board (Pet. App. 55a-56a).

equipment and freight. The Board believes that the court of appeals should have accepted its conclusion concerning the status of the dispatchers since it has " 'warrant in the record' and a reasonable basis in law." *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111, 131. The Board, however, did not petition for certiorari because, in its view, the difference between the Board and the court turns essentially on a differing evaluation of the facts of this particular case.[6] Should the Union's petition be granted, the Board will defend its order.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,
National Labor Relations Board.

DECEMBER 1977.

---

[6]Under the *Hearst* standard, *supra*, there must be " 'warrant in the record,' " *i.e.*, an adequate factual predicate, for the agency's ultimate conclusion. The court of appeals found "no substantial evidence to rebut the testimony that indicates that the dispatchers * * * possessed supervisory authority requiring the use of independent judgment as defined by §2(11)" (Pet. App. 5a).